No. 2781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition of the EQUITABLE TRUST COMPANY of New York, as Trustee, for a Writ of *Mandamus*, to be Issued and Directed to the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, Second Division.

BRIEF ON BEHALF OF RESPONDENT.

GARRET W. McENERNEY,
JOHN S. PARTRIDGE,
Counsel for Respondent.

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF ON BEHALF OF RESPONDENT.

This proceeding in mandate which was begun April 10, 1916, and resulted in an order to show cause made April 17, 1916, is, in its last analysis, a proceeding (a) to obtain a judgment by this court that an application made below by the petitioner April 3, 1916, under Section 21 of the Judicial Code, to disqualify District Judge Van Fleet is sufficient in law and was filed in time; (b) to reverse an order and determination to contrary effect made by Judge Van Fleet April 8, 1916; and (c) to require Judge Van Fleet to proceed as he would

have been in duty bound to do had he decided that the application was both sufficient and timely.*

The proceeding arises out of a suit pending in the District Court for the Northern District of California (Honorable William C. Van Fleet, District Judge, presiding), brought by the Equitable Trust Company of New York, as trustee, against Western Pacific Railway Company to foreclose a first mortgage given by the Railway Company to the Trust Company to secure a bond issue of $50,000,000 in respect whereof the Railway Company had fallen into default.

The suit was brought March 2, 1915, and new parties were impleaded in the course of the proceedings, but their names and the interests represented by them are of no consequence in dealing with the present proceeding.

We shall treat the action for the present as though there were but two parties to the suit, viz., the Trust Company and the Railway Company, and no other.

On February 21, 1916, *which was fifteen days before the commencement of the March term of the District Court,* Judge Van Fleet made an order directing that the Denver & Rio Grande and the Missouri Pacific Companies should be brought in and made parties defendant to the suit.

*This petition proceeds upon the theory that under Section 21 of the Judicial Code it was Judge Van Fleet's duty to certify the application for disqualification to the senior circuit judge for this circuit, then present therein (Pet., pp. 17, 18). Although it is of no importance whatever in this proceeding and we make no point of it, nevertheless in the interest of accuracy we desire to note the fact that under Sections 21 and 23 of the Judicial Code, in districts where there are more judges than one, another district judge may be called in and sit without the intervention of the senior circuit judge.

On March 6, 1916, *which was the first day of the March term of the District Court,* the Trust Company presented to Judge Van Fleet a stipulation, made by all the parties to the suit, for the immediate entry of the decree in foreclosure in the action and presented him with the form of such decree, calling to his attention the fact that there was a blank in the decree for the insertion of an upset price and asking that the court should determine whether an upset price was proper and, if so, what the amount should be.

In making this application the Trust Company was represented by Mr. Jared How, one of its counsel; and Mr. How was supported by Mr. John F. Bowie, one of the counsel for the reorganization committee of the bondholders of the Western Pacific Railway Company. In support of the application for an immediate entry of decree in foreclosure, affidavits by Mr. How and Mr. Bowie were read to Judge Van Fleet (Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 23 and Exhibit 24, pp. 6-9), to show that the matter of the immediate entry of a decree of foreclosure was one of great urgency for reasons which need not detain us now.

In making this application for a decree of foreclosure, the petitioner proceeded upon the theory that the order of February 21, 1916, directing the Denver & Rio Grande and Missouri Pacific to be brought in, was void; that the case was ripe for decree, and that the parties were entitled to a decree.

In the course of these proceedings on March 6, 1916, the following occurred:

> "Mr. How. I submit the form of decree which is attached to the stipulation between the plaintiff and the Western Pacific Railway Company and the Central Trust Company of New York with these stipulations, and *I move the court that this decree be entered forthwith* in the terms of the form attached to the stipulation. In the alternative, if that motion shall be denied, *I move that the cause be set for hearing* and for the entry of decree at such early day as the court may assign."
>
> (Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, p. 4.)

> "Mr. How. I want to call the attention of the court to the fact, first, that in the form of decree submitted to the court, it is provided that all claims which heretofore filed and asserted against either the receivers, or the Western Pacific, or *all claims or expenses which the receivers themselves may have incurred, shall be paid by the purchaser at the sale;* and it is provided that the possession of the purchaser at the sale may be subject to the condition that *this court may retake the property so transferred in case the purchaser,* or his successors, *shall fail to pay* the balance of the purchase price remaining unpaid, these items including taxes, *the expenses of the receivers and their counsel, and the trustee, and so forth.*"
>
> (Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, pp. 11-12.)

> "Mr. How. I also ought to call attention to the fact that *there is a blank in the form of decree* presented to the court, or rather, suggested to the court, and covered by the motion which has been made, *for the fixing of an up-set price.* In that regard I do not think that I ought to refrain from

saying that my conception of *the duty of the trustee is to take absolutely no part as to the up-set price which this court may see fit to set,* excepting that it holds itself liable to furnish the court such information as it may for the aid of the court. *The only suggestion that I think the trustee is entitled to make with any propriety is that the up-set price shall not be put at such figure as will make a sale impossible, as will not produce a bidder. What that figure is, I do not know.*

I submit the motion."

(Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, p. 12.)

"Mr. How. *I move the court that this decree be entered forthwith,* in the terms of the form attached to the stipulation; *in the alternative,* if that motion shall be denied *I move that the cause be set for hearing and for the entry of the decree at such early date as the court may assign.* The affidavits which I produced before your Honor are merely in support of our motion for a hearing at an early day and the entering of a decree at that time. *If the court thinks it wants to consider the matter of an upset price I should think of course it ought to be allowed that time* but I wanted to impress upon the court the urgency of the situation."

(Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, p. 26.)

While this application was being presented to Judge Van Fleet March 6, 1916, it came to his knowledge that on the same day petitioner had applied to this court for a writ of prohibition in respect of the order bringing in the Denver & Rio Grande and the Missouri Pacific companies, and that an alternative writ of prohibition had been issued by this court and made returnable March 16, 1916. Judge Van Fleet in consequence

announced that he would not pass upon the application for the immediate entry of a decree, and, of course, that was necessarily his position if he believed that his order of February 21, 1916, bringing in the Denver & Rio Grande and Missouri Pacific was a valid order. He thereupon continued the application for the immediate entry of a decree until Monday, March 13, 1916, and again on that day continued the matter until Monday, March 20, 1916.

In the discussion, however, in respect of this motion for the immediate entry of the decree in foreclosure, Judge Van Fleet announced that if the Circuit Court of Appeals should hold that the order directing the bringing in of new parties was void the case was ready for summary disposition and he would act accordingly.

In this connection, Judge Van Fleet said:

> "The COURT. Should the Circuit Court of Appeals, for instance, determine either that this court has no power to bring in the Denver, or that the presence of the Denver here is not essential, there will be no difficulty whatsoever, we can proceed and dispose of this matter in a very short time."
>
> (Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, p. 21.)

> "The COURT. If the Court of Appeals shall determine that this court is wrong in its view that Contract B must be interpreted here and may be disposed of like any other piece of physical property that is pledged under a mortgage there will be no difficulty at all in wiping the slate very clean in a very quick and expeditious way, thus disposing of all the difficulties."
>
> (Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, p. 24.)

That Judge Van Fleet's attitude was not misunderstood by Mr. How and Mr. Bowie is shown by the supplemental brief of petitioner, filed in this court March 23, 1916, in Cases Nos. 2755, 2756 and 2757,* where it is said (pp. 4-5):

> "The order of February 21, 1916, was made for the purpose of bringing the Denver Company in so that the rights of the trustee and bondholders against that corporation to recover from it the interest and the sinking fund might be enforced in this proceeding. Though this order is void, the lower court refuses to hear the cause presented by the pleadings, or to make a decree, though the cause is ripe for decree, the refusal being predicated on the existence of the void order. No other ground for the refusal to enter the decree forthwith has been suggested either by the court or by the receivers, and *it is conceded by the court that the decree should be entered forthwith if this order be void.*" (Italics theirs.)

(Before passing on, we desire to observe that the motion for an immediate decree of foreclosure so submitted to Judge Van Fleet March 6, 1916, has never been withdrawn by petitioner, and is now submitted to and undetermined by him.)

On March 10, 1916, four days after the motion had been submitted to Judge Van Fleet, the petitioner sued

*Case No. 2755 was the proceeding commenced in this court March 6, 1916, to annul the order of February 21, 1916, bringing in the Denver & Rio Grande and Missouri Pacific companies.

Case No. 2756 was the proceeding commenced March 9, 1916, appealing from the order of February 21, 1916, which enjoined the Trust Company from prosecuting the dependent suit in New York, of which we shall have occasion to speak later.

Case No. 2757 was the proceeding in mandate commenced March 10, 1916, to compel Judge Van Fleet immediately to enter a decree in foreclosure.

out a writ of mandate in this court to compel Judge Van Fleet to grant the motion thus made by the petitioner March 6, 1916.

This petition for mandate was made returnable March 16, 1916.

On March 16, 1916, therefore, there came before this court for hearing two matters:*(a) the writ of prohibition to annul the order of February 21, 1916, bringing in new parties; and (b) the proceeding in mandate to compel Judge Van Fleet to grant the then pending motion of the petitioner to enter the decree of foreclosure in conformity with the stipulation of the parties.

The matters were argued on March 16 and 17, 1916, and on the last named day submitted for decision. The petitioner, however, filed several briefs thereafter, viz., on March 20, 23, 24 and 28, 1916, and the proceedings thus submitted remained under advisement until March 29, 1916, at 2 P. M., California time, when this court decided the matters then under advisement.

In the decision rendered that day, this court held that the order bringing in new parties was void, and that it was the duty of the court below to grant the motion which had been submitted to it March 6, 1916.

In its opinion this court first made a full statement of the facts, and then proceeded to speak of the relief

*In this connection, we omit mention of the appeal from the order of February 21, 1916, enjoining the Trust Company from prosecuting the dependent suit in New York, as a factor not necessary to be considered here.

sought here by the Equitable Trust Company of New York, and said, among other things:

> "On February 21, 1916 the [district] court * * * ordered that the Denver and Rio Grande Railroad Company and the Missouri Pacific Railroad Company be made parties to the suit, and be compelled respectively to interplead, and to set up any rights which they or either of them might have in the suit.
>
> The Equitable Trust Company * * * applies to this court for a writ of prohibition to prevent the District Court from compelling the Denver and Rio Grande Railroad Company and the Missouri Pacific Railroad Company to interplead in the foreclosure suit.
>
> Writ of mandamus is also asked directing the District Court to grant the motion of the plaintiff made when the stipulations heretofore referred to were filed to enter foreclosure suit. To this petition answer is filed."
>
> (Opinion of March 29, 1916, pp. 20-21.)

The court then proceeded (p. 21) to analyze an application of the Savings Union Bank and Trust Company of San Francisco, to intervene (made to Judge Van Fleet March 13, 1916, and still pending before him undetermined), and stated the prayer of that company to include, among other things, the following:

> "Further prayer is that before ordering any sale of the properties of the Western Pacific the court take evidence with respect to the value of the Western Pacific and fix an up-set price below which the commissioner making the sale will not be permitted to receive a bid for said properties; and that the up-set price be high enough to properly protect the interest of intervenors and of first mortgage bondholders not parties to the plan of reorganization." (p. 25.)

The court then dealt with the application for a decree on March 6, 1916, and said:

> "The parties to the suit were all agreeable to a decree in foreclosure, and upon the showing made by affidavit and pleadings before the court we think were entitled to have the case proceed with convenient expedition unless some matter arose which called for inquiry and delay. We say this because the affidavits presented to the court disclosed that the relief which the trustee asked for in behalf of the mortgage bondholders could only be wholly effectual by prompt judicial enforcement of the rights of the trustee." (pp. 25-26.)

Again:

> "The record shows that neither plaintiff nor defendant invoked the jurisdiction of the court as against the Denver Company, and that no question was before it for adjudication except the right of the trustee to foreclose the mortgage of the Western Pacific." (pp. 31-32.)

Again, (*respecting upset price*):

> "We are satisfied, however, that the District Court in its discretion has full power to make an order concerning an up-set price upon the sale, if such procedure should be deemed desirable by the court; of course, hearing may well be accorded to these petitioners and such others as may appear to have any interest in the proceeding for the purpose of aiding the court in ascertaining and determining what the up-set price should be." (p. 34.)

Finally, and at the conclusion of its opinion, this court said:

> "The trustee, Equitable Trust Company, had a right to proceed to foreclosure as it prayed against the Western Pacific.

> The Denver Company was not a necessary or proper party to such foreclosure proceedings, and the Denver Company not being within the jurisdiction of the court and the court having no custody of its property, no order could be made compelling it to interplead in the foreclosure suit.
>
> * * * * * *
>
> That part of the order which would compel the Denver Company and the Missouri Pacific Company to become parties to interplead having been in excess of jurisdiction, writ of prohibition is properly invoked. U. S. v. Mayer, 235 U. S. 67; McClellan v. Carland, 217 U. S. 268; In re Rice, 155 U. S. 396.
>
> We shall deny the petition for a writ of mandamus because every presumption is that the District Court, being advised of the views of this court, will proceed to give the parties full measure of relief." (pp. 34-35.)

It is thus to be seen that with the handing down of the opinion of March 29, 1916, nothing remained for Judge Van Fleet to do but to determine (a) whether the case was an appropriate one for an upset price, and (b) in that event, what the amount of that upset price should be.

As we have already shown, the application submitted by the petitioner on March 6, 1916, for an immediate decree was postponed by Judge Van Fleet until March 13, 1916, and on that day until March 20, 1916.

The petition alleges (pp. 4-5):

> "On the 20th day of March, 1916, the said Honorable William C. Van Fleet announced that he would make no orders and take no proceedings in the said action of the Equitable Trust Company of New York, as trustee, against the Western Pacific Railway Company, until after this Honorable Court determined the matters then pending before it."

On March 20, 1916, Judge Van Fleet postponed action in the matter of the motion for an immediate decree of foreclosure until March 27, 1916, and again until April 3, 1916.

In the meantime, as already stated, this court handed down its opinion of March 29, 1916, and, although that opinion did not in terms constitute a peremptory writ of mandate commanding Judge Van Fleet to proceed to enter a decree after having determined (a) whether the case was a proper one for an upset price, and (b) if so, in what amount, nevertheless in every substantial sense it was a writ of mandate to that purport and effect.

So that, when court opened on Monday, April 3, 1916, the case was ready for summary treatment, *not only because this court had so commanded in its opinion of March 29, 1916, but because on March 6, 1916, Judge Van Fleet announced that if this court held a view in respect of the litigation contrary to the views to which he sought to give effect in his order of February 21, 1916, the matter would be open for summary disposition.*

What questions were involved which interfered with its forthwith disposition? No question except (a) the propriety of an upset price, and (b) the amount thereof, if it should be determined that the case was a proper one for an upset price.

The form of the decree had been agreed upon by the parties, and no one had objected to it.

Therefore, the sole question was one of upset price.

What prevented Judge Van Fleet from determining the matters in respect of an upset price and immediately entering a decree of foreclosure?

He was prevented from doing what he had been informally directed by this court to do by an affidavit to disqualify him for personal bias and prejudice, filed under the authority of Section 21 of the Judicial Code.

This affidavit was made by Mr. Lyman Rhoades, one of the vice-presidents of the Equitable Trust Company of New York and an officer thereof

> "in charge of the Trust Department of said Trust Company, and particularly in charge of the matter of executing the trusts vested in said Trust Company, and * * * in charge of the execution of the trusts vested in said Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company * * * and under that certain contract B hereinafter referred to." (Pet. pp. 19-20.)

This affidavit was made in New York on March 29, 1916,

> "before the Equitable Trust Company, or said Lyman Rhoades, had been informed that this Honorable Court had delivered its opinion upon the matters then pending before it." (Pet. p. 6.)

We shall have occasion later to show (as we pointed out before Judge Van Fleet April 7, 1916) that this affidavit was made for use in anticipation or against the eventuality that the decision of this court should be against the petitioner in all of the matters taken under advisement March 17, 1916. Of this there can be no question whatever, and the result is that the affi-

davit was constructed upon the assumed existence of controversies which would have existed had the decision of this court been the other way but which had no existence whatever on April 3, 1916, nor since, because of the decision of this court.

We shall also have occasion to claim that under these circumstances it was improper to file this affidavit on April 3, 1916, because it was predicated upon the assumption that when the affidavit reached San Francisco there would be controversies undetermined, which controversies ceased to have any existence after the affidavit had been mailed on March 29 1916, and before it reached San Francisco in the mail.

These matters, however, must be reserved for later consideration, and we resume our narrative.

The affidavit was executed in duplicate, and the duplicates were received by Mr. How at San Francisco, the first on Sunday, April 2, 1916, and the other in the first mail of Monday, April 3, 1916. (See his testimony April 7, 1916, p. 90.)

The significance of these dates can be made quickly apparent.

On March 18, 1916, the day following the conclusion of the arguments before this court in the matters then before it, Mr. Rhoades arrived from New York in San Francisco (Pet. p. 61), and he remained until after Judge Van Fleet announced on March 20, 1916, that he would take no steps in the suit before him until after this court should hand down its decision.

In the meantime, however, and while Mr. Rhoades was in San Francisco, on March 18, 19 and 20, 1916, an affidavit to disqualify Judge Van Fleet was in course of preparation, for Mr. How testifies:

> "I saw a part of a draft when Mr. Rhoades was here, but I paid very little attention to it.
>
> * * * * * *
>
> I would like to explain that answer if you will permit me. I was extremely solicitous not to have any part in framing this affidavit. I had been in the case from beginning to end, sometimes in very bitter controversies, and I regret to say that at times my personal relations with Mr. Partridge were not as pleasant as I would have liked to have them. I was extremely desirous and so stated that I did not want any possibility of being accused of having my personal feeling in the matter enter into any belief that the Equitable Trust Company or its officers might entertain in the premises; therefore I refused to have anything to do with drawing this affidavit. I saw some preparations going on but did not stay by them; I did not talk with Mr. Rhoades myself about the matter three minutes. The affidavit is not mine; it is the affidavit of the officers of The Equitable Trust Company of New York, prepared in New York and sworn to in New York and sent to me to file as counsel. I considered it my duty to file it and I filed it. I believe it was made in good faith because I seldom have seen a man more conscientious in regard to what he should swear to than Mr. Rhoades was so far as I did observe him."
>
> (Proceedings of April 7, 1916, pp. 94-95.)

It is here to be noted that although the petitioner was engaged on March 18, 19, and 20, 1916, in preparing to disqualify Judge Van Fleet, it was maintaining a proceeding before him for the immediate entry

of a decree of foreclosure (which it never withdrew), and it was maintaining, and continued until March 29, 1916, to maintain, in this court a proceeding to compel him to do so.

We have already suggested that the affidavit in course of preparation in San Francisco on March 18, 19 and 20, 1916, and completed and executed in New York March 29, 1916, was begun and completed for use in the event that the decision of this court should be against the petitioner in the matters taken under advisement March 17, 1916; and we think that it is very clear that in the preparation of the affidavit there was no idea that it would be used in the event the proceedings under submission in this court should be decided *for* the petitioner instead of *against* the petitioner.

Although this court may not be aware of the fact, it was nevertheless the general expectation of the parties that this cause would be decided before the end of March, because the calendar of the then term of this court came to an end in the latter part of March and it was believed by the parties that the decision would be handed down before the circuit judges then sitting should return to their homes.

When Monday, March 27, 1916, passed without a decision by this court and the proceedings before Judge Van Fleet had been postponed to April 3, 1916, the petitioner was alive to the fact that in all probability during the then current week the decision of this court would come down and would leave Judge Van Fleet

ready to proceed to carry out his order of February 21, 1916, if the decision should be adverse to the petitioner. We assume, therefore, that during the week of March 27, 1916, it was regarded by the petitioner as highly important that the affidavit should be here, ready for filing, not later than the first mail of Monday, April 3, 1916, and, presumably, to guard against the danger of delay or loss in the mails the affidavit was executed in duplicate, one of the duplicates coming into Mr. How's hands on Sunday, April 2, 1916, and the other in the first mail of Monday, April 3, 1916.

The affidavit was filed before the opening of court on Monday, April 3, 1916, and on that day called to the attention of Judge Van Fleet, who requested that it be read (Pet., p. 69). Counsel for petitioner replied:

> "Mr. How. *I protest against doing that, because I think the filing of the affidavit is all that is required.* I am quite willing to read it though."

After the affidavit had been read and during a colloquy between court and counsel, Mr. How said (Pet., p. 116):

> "The case of Henry v. Speer, 201 Fed. 869, is the only case I know of under this section of the statute."

Mr. How read from the decision just cited, as follows (Pet., p. 117):

> "Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute *and to determine its legal sufficiency.* If he finds it to be legally sufficient then he has no

> other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification."
>
> (201 Fed. 872.)

He later said (Pet., p. 126):

> "Mr. How. The only decision that I know of is the one I read to your Honor."

Judge Van Fleet then postponed the matter of his determination in respect of the affidavit for disqualification until Wednesday, April 5, 1916, whereupon the following occurred (Pet., p. 128):

> "Mr. McEnerney. In the application filed here on Monday, if your Honor please, under section 21 of the Judicial Code, your Honor has requested Mr. Partridge and me to appear here and lay before you such considerations respecting the law and facts as occur to us; as we were not able to get a copy of the affidavit until yesterday, and as I was not able to see it until this morning, we ask that the matter stand over until Friday, and as I am not able to be here in the forenoon, we ask that the hour be fixed for two P. M."

The matter was then adjourned until Friday, April 7, 1916, at 2 p. m., whereupon evidence was introduced, and the matter presented to the court by counsel and decided by Judge Van Fleet.

There were offered in evidence (a) the records, proceedings, briefs and registers of action in this court in cases Nos. 2755, 2756 and 2757, decided March 29, 1916, and a stenographic transcript of all the proceedings had in this court in said case, on March 16 and 17, 1916;

(b) the records, pleadings and all proceedings had in the District Court in the suit in foreclosure, together with a stenographic report of all proceedings had in that cause, from its commencement, and the (form of) decree presented to Judge Van Fleet by Mr. How March 6, 1916; (c) the oral testimony of Mr. Jared How, and (d) the affidavits of Judge Van Fleet and Mr. Partridge.

This evidence and the printed record and the stenographic account of the proceedings of April 3, 5, 7 and 8, 1916, are both necessary and sufficient for a full understanding of this proceeding.

At the conclusion of the proceedings of Saturday, April 8, 1916, Judge Van Fleet ruled that the affidavit had not been filed in time; that no good cause had been shown for the failure to file the same ten days before the commencement of the term, and also that the affidavit did not otherwise conform to the requirement of the statute; and he refused to make the order requested by the petitioner, which read as follows (Pet., p. 65):

[Title of Court and Cause.]

> "An affidavit of personal bias and prejudice and application that another Judge shall be designated for further proceedings in this action, accompanied by a certificate of counsel of record for plaintiff herein that such affidavit and application are made in good faith, having been filed by said plaintiff in this action.
>
> It is hereby ordered that the fact of the filing of such affidavit and application be entered on the records of the court and that an authenticated

copy thereof shall be forthwith certified to the Senior Circuit Judge for this circuit now present in the circuit, to the end that such proceedings may be had thereon as are provided by law."

We have now come to the end of our narrative.

These are the facts upon which the present proceeding turns, and the question presented is whether, considering that Judge Van Fleet has decided the application to be both insufficient and not made in time, this court will reverse that decision and issue its process in accordance with such reversal.

The sections of the Judicial Code involved are Sections 20, 21, 14, and 23, and read as follows:

"Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside

with absolute impartiality in the pending suit or action."

"Sec. 20. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."

"Sec. 14. When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein."

"Sec. 23. In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the dis-

trict lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

We proceed to consider the legal questions involved.

I.

EX PARTE AMERICAN STEEL BARREL CO. (1913), 230 U. S. 35, IS CONCLUSIVE HERE, FOR IT DECIDES (a) JUDGE VAN FLEET HAD JURISDICTION TO RULE "THAT THE AFFIDAVIT HAD NOT BEEN FILED IN TIME OR THAT IT DID NOT OTHERWISE CONFORM TO THE REQUIREMENT OF THE STATUTE"; (b) HIS ERROR IN SO DOING, IF ANY THERE WAS, IS TO BE REVIEWED UPON THE COMING HERE OF AN APPEALABLE ORDER OR DECREE IN THE CASE, AND (c) MANDAMUS WILL NOT LIE.

Ex Parte American Steel Barrel Co., (1913) 230 U. S. 35, arose out of the affairs of a corporation which had been adjudged to be bankrupt in involuntary proceedings had before District Judge Chatfield. Later, the creditors made application to extend the receivership to the property of the American Steel Barrel Company said by them to be owned by the bankrupt. March 15, 1912, Judge Chatfield filed an opinion denying this application, but no order was made in accordance therewith because counsel for the creditors asked for time to make a new application.

The new application was filed on March 29, 1912, and, on the same day, an application to disqualify Judge Chatfield for personal bias and prejudice.

It is to be noted that this application was not filed until March 29, 1912, which was less than ten days

before the April term of the district court—a fact noted by the court (230 U. S. 44); and, moreover, the proceedings had been pending before Judge Chatfield for a long time prior to March 29, 1912.

District Judge Chatfield adjudged the proceedings to be sufficient and timely, and certified them to Senior Circuit Judge Lacombe, who on April 2, 1912, appointed District Judge Mayer to sit in the case.

> "Thereupon Judge Mayer assumed jurisdiction and has since made many interlocutory orders and rulings in the case, to all of which the opposite parties in the proceeding objected and excepted upon the ground that his designation was null and void. Nevertheless, Judge Mayer continued to exercise jurisdiction from the time of his designation, in April, 1912, down to the filing of this petition in February, 1913."
>
> 230 U. S. 42.

The proceeding before the Supreme Court was (a) to compel District Judge Chatfield to resume jurisdiction and, among other things, to enter an order in accordance with his opinion of March 15, 1912; (b) to vacate the order of Senior Circuit Judge Lacombe designating Judge Mayer to sit in the place of Judge Chatfield; and (c) to quash and set aside all proceedings taken in the bankruptcy proceeding by Judge Mayer.

The Supreme Court said (230 U. S. 45):

> "We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that 'personal bias or prejudice' existed",

and decided (a) that Judge Chatfield had held the affidavit sufficient in law; (b) that if Judge Lacombe had mistakenly appointed Judge Mayer he could not be compelled through a writ of mandamus to undo what he had done; (c) that if Judge Mayer's appointment was "wholly beyond the judicial power of the senior circuit judge, his authority to make any order or decree acting thereunder might have been excepted to, and thus made the subject of review in due course of law"; (d) that a writ of mandamus will be granted "only when it is clear and indisputable that there is no other legal remedy"; and, finally, (e) that "the long delay in asking the extraordinary remedy of mandamus would fully justify this court in the exercise of a sound discretion in denying relief".

In the course of its opinion, the court, speaking of proceedings to disqualify a judge under Section 21 of the Judicial Code, said:

> "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him

between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."

230 U. S. 43-44.

"We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that 'personal bias or prejudice' existed. If Judge Chatfield had ruled that the affidavit had not been filed in time or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. Henry v. Speer, 201 Fed. 869; Ex parte M. K. Fairbank Co., 194 Fed. 978; Ex parte Glasgow, 195 Fed. 780, affirmed by this court in 225 U. S. 420, 56 L. ed. 1147, 32 Sup. Ct. Rep. 753.

* * * * * * *

The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy. Ex parte Newman, 14 Wall. 152, 165, 20 L. ed. 877, 879; Bayard v. United States, 127 U. S. 246, 32 L. ed. 116, 8 Sup. Ct. Rep. 1223; Re Morrison, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246."

230 U. S. 45.

It will be helpful to a full understanding of Section 21 of the Judicial Code to review briefly the three cases above cited, which deal with that section.

Ex parte Fairbank Co., (1912) 194 Fed. 978, was an application by the Fairbank Company to disqualify District Judge Jones of Alabama for personal bias and prejudice, and arose out of an action pending in his district, entitled *Jackson Lumber Co. v. Fairbank Co.*

The controversy arose out of a letter written by the attorneys of the Fairbank Company to Circuit Judge Shelby, asking for the appointment of another district judge to try the case upon the ground that the trial had been too long delayed. Judge Shelby sent the application to Judge Jones, who took exception thereto in a long letter to Judge Shelby, a copy of which he put into the hands of the attorneys for the Fairbank Company. Thereupon the application to disqualify Judge Jones followed. This application was overruled and denied by Judge Jones (p. 986), who decided, among other things, as follows (p. 985):

> "The application and affidavits are fatally defective, whether construed separately or in connection with the application to which they refer, because they do not charge as a matter of fact that the judge 'has a personal bias or prejudice against the defendant or in favor of the plaintiff'. They affirm in legal effect only that affiants are 'informed and believe' such is the fact.
>
> * * * * * * *
>
> They are not accompanied by any statement, as the Judicial Code explicitly requires, 'of the facts and the reasons for the belief', save in one immaterial instance, the correspondence, which on its face, both as matter of law and morals, disproves the existence of either bias or prejudice between the parties.
>
> * * * * * * *
>
> The correspondence between the presiding judge and Judge Shelby, made an exhibit to the petition, shows on its face as a matter of law that the presiding judge has no prejudice against the defendant or bias for the plaintiff. It does not even show prejudice against the petitioner's attorney who wrote the application which called forth the letter to Judge Shelby."

Again (p. 990):

> "It is not the proper construction of the Judicial Code to hold that Congress intended that any reason that a litigant may choose to assign in his affidavit, however absurd or ridiculous in point of law or morals, will disqualify the judge, or render it improper for him to preside in the case. 'The statute meant that the cause should be a legal and substantial one.' 2 Metc. (Ky.) 629. The facts stated must be strong enough to overcome the presumption of the trial judge's integrity and of the clearness of his perceptions. State v. Bohan, 19 Kan. 54. 'The affidavit or affidavits must not only state facts, but the facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice which will in all probability prevent him from dealing fairly with the defendant.' People v. Findley, 132 Cal. 304, 64 Pac. 472."

In *Ex parte Glasgow,* (D. Ct., N. D. Ga., 1912) 195 Fed. 780, Glasgow was indicted and convicted for depositing an obscene book in the mails. The conviction occurred before the Judicial Code went into effect, but his sentence came on later. He sought to disqualify the judge from hearing his motion for arrest of judgment, etc., under Section 21 of the Judicial Code. The trial judge overruled his application under the section and sentenced him to imprisonment. He then sued out habeas corpus. The application for the writ of habeas corpus was denied and the prisoner remanded.

Said the court (pp. 782-783):

> "The question is, first, whether or not the alleged error of the judge in holding this affidavit ineffectual to stop the case at the stage it had reached, under all the circumstances, could have

been taken up for review to the Circuit Court of Appeals for the Third Circuit. Counsel urges that it could not, because, as he states, there was no judge to certify the bill of exceptions or from whose judgment and action the writ of error could have been taken. The position, as I understand it, is that the moment the affidavit was filed the judge became disqualified absolutely and any act of his thereafter, in the case, would have been void. I am unable to agree with counsel about this. There does not seem to me to be the slightest difficulty where the suggestion is made under this section of the new Judicial Code, or otherwise, that a judge is disqualified and he overrules it, and proceeds to try the case or to conclude it if he is engaged in trying it, so far as that action can be taken to the proper appellate court for review, the judge who tries the case can certify to what occurred on the trial for the purpose of allowing the same to be so reviewed.

This being true, the action of the judge was such that it was reviewable, and errors of a judge in the trial of a case will not be considered by another court on habeas corpus.

* * * * * * *

As has been stated, all that was done in the case, including the action of the judge with reference to the affidavit filed under section 21, was a matter for review by the Circuit Court of Appeals on writ of error, and for the court here to pass upon these questions upon a writ of habeas corpus would clearly be beyond the proper scope and use of that writ."

Henry v. Speer, (C. C. A., 5th C., 1913) 201 Fed. 869, was a petition in mandate to require District Judge Speer to certify a disqualifying affidavit to the senior circuit judge and to desist from further jurisdiction in a cause.

The court held that the affidavit was insufficient because it did not state that Judge Speer had "a *personal* bias or prejudice".

The court said (p. 872):

> "But the statute requires the use of the word [personal], and it may not be avoided. Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with its provisions. The affidavit filed below illustrates the necessity for such compliance. Its perusal reveals the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment of the merits of the controversy and 'against deponent's right to recover.' Section 21 is not intended to afford relief against this situation.
>
> Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification.
>
> The judge having correctly ruled that the affidavit herein filed was not the affidavit specified and required by the statute, the duty was not imposed upon him to comply with the provisions of section 20.
>
> The petition for mandamus will be denied."

It is to be observed that it was not decided in this case that mandamus would lie, but it was in terms decided that the judge sought to be disqualified had "the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency".

In this case Judge Van Fleet had the additional duty to determine whether good cause had been shown for a failure to present the affidavit "in time".

Thus two judicial duties were imposed upon Judge Van Fleet, and if he erred in either or both his action must be reviewed upon appeal and cannot be reversed on mandamus (230 U. S. 45).

II.

THE DECISION OF EX PARTE AMERICAN STEEL BARREL CO. (1913), 230 U. S. 35, THAT MANDAMUS WILL NOT LIE IS IN ACCORDANCE WITH THE SETTLED RULE OF THE SUPREME COURT.

The power of the federal courts to issue mandamus is in aid of their appellate jurisdiction, and mandamus is granted "only for the purpose of bringing the case to a final judgment or decree, *so that it may be reviewed*". This is a totally different power from the power which exists in many of the states and which, in those states, is referable not to appellate jurisdiction but to general supervisory power over inferior courts and officers.

This is well brought out in *Kendall v. United States,* (1838) 37 U. S. (12 Pet.) 524, where it is said (pp. 620-622):

> "The theory of the British government, and of the common law is, that the writ of mandamus is a prerogative writ * * *. And the power to issue this writ is given to the King's Bench only, *as having the general supervising power over all inferior jurisdictions and officers, and is co-extensive with judicial sovereignty.*
>
> *And the same theory prevails in our State governments,* where the common law is adopted, and governs in the administration of justice * * *.
>
> **But the writ of mandamus, as it is used in the courts of the United States * * * cannot, in any just sense, be said to be a prerogative writ, according to the principles of common law.**
>
> * * * * * * *
>
> Under the Judiciary Act the power to issue this writ, and the purposes for which it may be issued in the courts of the United States, * * * is given by the fourteenth section of the act, under the general delegation of power 'to issue all other writs not specially provided for by statute, which may be necessary for the exercise of their respectice jurisdictions, and agreeable to the principles and usages of law'. And it is under this power that this court issues the writ to the circuit courts to compel them to proceed to a final judgment or decree in a cause, *in order that we may exercise the jurisdiction of review given by the law;* and the same power is exercised by the circuit courts over the district courts, *where a writ of error or appeal lies to the Circuit Court.* But this power is not exercised, as in England, by the King's Bench, as having a general supervising power over inferior courts; *but only for the purpose of bringing the case to a final judgment or decree, so that it may be reviewed.* The mandamus does not direct the

> inferior court how to proceed, but only that it must proceed, according to its own judgment, to a final determination; *otherwise it cannot be reviewed in the Appellate Court.* **So that it is in a special, modified manner, in which the writ of mandamus is to be used in this court, and in the circuit courts in the States.''**

The ampler power which exists under the constitutions of many of the states will be made clear by a reference to the California rule.

See:

Hyatt v. Allen, (1880) 54 Cal. 353;

Matter of Davidson, (1914) 167 Cal. 727, reversing same case, (1914) 24 Cal. App. 407.

The difference between the Federal rule and the California rule is well brought out in *Vine v. Jones* (1900), 13 S. D. 54; 82 N. W. 82. This was a proceeding to compel the circuit court to hear and determine whether the judge of the county court had become disqualified to act in an estate and, if so, to transfer all matters relating to such estate to the circuit court. The circuit court had refused to hear the matter, but was compelled to do so.

In the opinion it is said (p. 84):

> '' 'No doubt the general rule is that an appellate court will not, by mandamus proceedings, review the decision of an inferior court, nor require such court to reverse its decision, and enter a different one; and it may be that a court possessing strictly appellate powers only ought never to do this, and so the courts of many of the states have so stated the rule without qualification; but the supreme courts of Michigan, Louisiana, and Alabama have not been governed by this rule, because they have

> held their powers and jurisdiction, under their respective constitutions, to be more than simply appellate. The constitutions of those states, like our own, confer upon the supreme court, besides appellate jurisdiction, a general superintending control over all inferior courts. Article 5, § 2, Const. S. D. This provision materially enlarges the powers of otherwise only appellate courts, and enables them, by means of their various writs, prerogative and remedial, to control and correct the decisions of inferior courts in special cases, and prevent injustice and irreparable injury, when the circumstances demand an immediate review, the case is urgent, and an appeal will not afford an adequate remedy.' "

If we keep in mind (a) the plenary power in mandamus possessed by the courts of some of the states, and (b) the limited power in mandamus possessed by federal courts, we shall not make the mistake of applying decisions of state courts, which are inapplicable in federal cases.

In *Ex parte Roe,* (1914) 234 U. S. 70, a Federal district judge refused to remand a case to the state court and an attempt was made to review his decision by mandamus. This case collects all the late authorities upon the subject of mandamus, and decides (pp. 72-73):

> "Whether the ruling was right or wrong, it was a judicial act, done in the exercise of a jurisdiction conferred by law, and, even if erroneous, was not void or open to collateral attack, but only subject to correction in an appropriate appellate proceeding. Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; Re Metropolitan Trust Co., 218 U. S. 312, 54 L. ed. 1051, 31 Sup. Ct. Rep. 18. Like any other ruling in the progress of the case, it will be regularly subject to appel-

late review after final judgment, and the authorized mode of obtaining such a review, the action being at law, is by a writ of error. Judicial Code, §§ 128, 238; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 582, 40 L. ed. 536, 542, 16 Sup. Ct. Rep. 389.

The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal."

The court then cited a long list of cases, concluding with the important decision in *Ex parte Harding,* (1911) 219 U. S. 363, and commented upon it as follows (234 U. S., p. 73):

"In the last case the subject was extensively considered and it was held that the writ of mandamus may not be used to correct alleged error in a refusal to remand where, after final judgment, the order may be reviewed upon a writ of error or an appeal. To that view we adhere, and therefore we are not here at liberty to consider the merits of the question involved in the District Court's ruling."

U. S. v. Judges (C. C. A. 8th C., 1898), 85 Fed. 177, involved an application on behalf of a person convicted of crime who sought by mandate to procure his admission to bail. The court decided that he was not entitled to be admitted to bail, and its action was affirmed in the language following (pp. 179-180):

"The question whether the relator is entitled to be admitted to bail while his appeal is pending in the United States court of appeals in the Indian Territory is a judicial question which has already been decided by that court after full argument, and

> the only purpose which the relator seeks to accomplish by this writ is to obtain a review of that decision by this court, and its direction to the court below to reverse the judicial decision it has already rendered. But the writ of mandamus may not be made to perform the office of an appeal or of a writ of error to review the action of a court in the lawful exercise of its jurisdiction, nor can it issue to command a court or an officer to decide a judicial question in a particular way; much less may it be invoked to direct such a court or officer to reverse a decision of a judicial question which has already been rendered. In re Rice, 155 U. S. 396, 403, 15 Sup. Ct. 149; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 379, 13 Sup. Ct. 758; In re Parsons, 150 U. S. 150, 156, 14 Sup. Ct. 50; Ex parte Morgan, 114 U. S. 174, 5 Sup. Ct. 825; Ex parte Whitney, 13 Pet. 404."

It is clear from the foregoing that mandamus will not lie, and, if we stop to consider the facts here involved, it is made all the clearer that the remedy should be by appeal. On April 3, 1916, the case was ready for a summary disposition of the petitioner's motion for an immediate entry of the decree. If, in the making of that decree, Judge Van Fleet (a) decided either that an upset price was or was not proper in the case, or (b) having decided that it was proper, fixed the amount too high or too low, it would have been open for the petitioner forthwith to take an appeal, and upon that appeal it could have reviewed the error committed by Judge Van Fleet, if error it were, in deciding that the attempt to disqualify him was insufficient and not in time.

In all of this we are not unmindful that mandamus has been granted in a case where "*the order has no*

judicial character but is simply an unauthorized exclusion of him [the litigant] by virtue of de facto power'' (*Ex parte Uppercu* [1915], 36 Sup. Ct. Rep. 140, 141), and in some cases where there was a *''clear absence of jurisdiction''*. (See *In re Dennett* [C. C. A., 9th C., 1914], 215 Fed. 673; *In re Griggs* [C. C. A., 8th C., 1915], 227 Fed. 795.) (It is by no means clear that the power of the Circuit Court of Appeals in the matter of mandamus is as comprehensive as that of the Supreme Court, but we do not think that this question need be considered in the decision of the present proceeding, and we shall not go into the discussion of that question.) *As we have already seen, however, there can be no question about the jurisdiction of a judge, sought to be disqualified, to determine the sufficiency and timeliness of the application, and, that factor being present here, the authorities just cited also sustain us in the contention that mandamus will not lie.*

III.

A JUDGE SITTING TO DETERMINE AN APPLICATION FOR HIS OWN DISQUALIFICATION IS ACTING JUDICIALLY, AS MUCH SO AS IF HE WERE HEARING AN APPLICATION TO DISQUALIFY ANOTHER JUDGE OR TO CHANGE THE VENUE OF AN ACTION OR TO REMAND A CAUSE FROM A FEDERAL TO A STATE COURT.

In *Ex parte American Steel Barrel Co.,* (1913) 230 U. S. 35, it is said that Section 21 of the Judicial Code only applies where ''the affiant is able to state * * * facts and reasons *which tend to show* personal bias or

prejudice'' (p. 43); and that the judge sought to be disqualified was bound to determine and rule whether or not the affidavit was timely and sufficient (p. 45).

In *Henry v Speer,* (C. C. A., 5th C., 1913) 201 Fed. 869, it is decided that ''of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and *to determine its legal sufficiency''* (p. 872).

In *Ex parte Fairbank Co.,* (1912) 194 Fed. 978, it was held that ''*the facts stated must establish to the satisfaction of a reasonable mind* that the judge has a bias or prejudice which will in all probability prevent him from dealing fairly with the defendant'' (p. 990).

See also:

Schmidt v. Mitchell, (1897) 101 Ky. 570; 41 S. W. 929, 934;

Givens v. Lord Crawshaw, (1900) 21 Ky. Law Rep. 1618; 55 S. W. 905;

Powers v. Commonwealth, (1902) 114 Ky. 237; 70 S. W. 644;

Tolliver v. Commonwealth, (1915) 165 Ky. 312; 176 S. W. 1190.

In *Schmidt v. Mitchell,* supra, the court says (p. 934):

> ''In the case of Insurance Co. v. Landram, 88 Ky. 434, 11 S. W. 367, 592, this court held that, where such an affidavit is filed, it becomes the duty of the judge to pass upon the sufficiency of the affidavit, and to determine whether the facts stated in the affidavit make it improper for the presiding judge to try the case. It was there held that it was insuffi-

cient to state that the party making the affidavit believed he could not obtain a fair and impartial trial, and the court said that: '* * * If the charges are false, they should be made in such a manner as would subject the party making them to criminal punishment. The fact or facts upon which the belief that the judge will not give the litigant a fair trial should and must be stated in the affidavit, and they must be of such a character as shall prevent the judge from properly presiding in the case.' A careful examination of the affidavit filed in this case shows that the averments are based almost entirely upon hearsay, and that it is not drawn in conformity with the rule laid down in the Landram case, supra."

In *Tolliver v. Commonwealth,* supra, it is said (p. 1193):

> "The judge himself must pass upon the facts stated as to whether or not they constitute a sufficient cause to require him to vacate the bench, but his decision on such a question may be reviewed by this court."

In *Bell v. Bell,* (1910) 18 Idaho 636; 111 Pac. 1074, the court says (p. 1075):

> "If the facts constituting prejudice must be set forth in the affidavit, then the judge may determine whether or not as a matter of law such facts constitute legal prejudice."

In *Hays v. Morgan,* (1882) 87 Ind. 231, the syllabus reads as follows:

> "An affidavit for a change of venue for bias of the judge, which discloses that a decision by the court of a question of law against the party was the real reason which induced the application, is insufficient, inasmuch as the charge of bias is fully negatived by the affidavit itself."

This case is instructive for the reason that in Indiana the facts out of which bias and prejudice are claimed to arise need not be alleged. The Indiana statute requires only an affidavit alleging that the judge is biased or prejudiced. It does not require a statement of the facts or reasons upon which the charge is based. In the case at hand, however, the party went beyond the requirement of the statute and stated the reasons upon which he based his belief. The court thereupon held that the reasons given qualified the opinion of the affiant that he could not secure a fair trial. The affidavit thus being held insufficient, the motion was properly denied. In this connection, the court said (p. 233):

> "When he in the affidavit qualifies the general charges of bias and prejudice, by alleging the reasons which induced him to make them, and the reasons were that the judge had made a ruling and rendered a decision against him upon a legal proposition, without alleging that the ruling and decision was wrong or made through prejudice, we think he destroyed the force of the general charges, and failed to show sufficient cause for a change."

In *Talbot v. Pirkey* (1903), 139 Cal. 326, *prohibition* to a judge who decided against his own disqualification *was refused.* The court said:

> "Having jurisdiction to try the cause, he cannot be prohibited from doing so, and his error, if error there was, in denying the motion can only be reviewed on appeal."

People v. Compton (1899), 123 Cal. 403, 412-414, deals with an affidavit to disqualify a judge. *The judgment and order* were reversed and cause remanded because the judge should have disqualified himself.

In *Hoyt v. Zumwalt* (1906), 149 Cal. 381, 388, *the judgment and order appealed from* were affirmed, and it was decided that the court did not err in refusing to call in another judge to hear and determine the motion, and did not err in denying it on the showing made. It was said:

> "To support the motion facts must be stated from which it may be reasonably inferred that such bias exists."

In *Swan v. Talbot* (1907), 152 Cal. 142, *the judgment and order were appealed from* notwithstanding an unsuccessful attempt to disqualify the trial judge. The court said (p. 144):

> "The law has seen fit to impose this painful duty upon him, and he may not shirk its performance."

In re Friedman's Estate (Sup. Ct. Cal., December 13, 1915), 153 Pac. 918, involved an unsuccessful attempt to disqualify Judge Graham, of the Superior Court for San Francisco. The motion to transfer the cause was denied and *an appeal followed*:

The court said (pp. 924-925):

> "Thus we have reviewed, perhaps with undue detail and discussion, the separate contentions of appellants touching the bias and prejudice of the judge. It can never be an agreeable duty for a judge himself to pass upon his question, but it is a duty the performance of which our law imposes on him. It is both expected and presumed that he can and will perform that duty with impartiality. Hoyt v. Zumwalt, 149 Cal. 381, 86 Pac. 600. It is as much his duty to retain a case in which he is not disqualified as to transfer a case in which he is disqualified. Heinlen v. Heilbron, 97 Cal. 101, 31

> Pac. 838; Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066. Wherever an honest doubt may be thought to exist, we believe the profession need have no fear but that the trial judge will with alacrity resolve that doubt in favor of the moving party. No judge desires to sit in a cause where his fairness is questioned. Where it is seriously questioned, he, more than any, will desire that the transfer be made, because he, better than any, knows that, while it is of first importance that the source of justice be fair and impartial, it is of secondary importance only that by the litigants before him it should be believed to be fair and impartial. But in the case before us not only the long delay in preferring the charge, but the foundations of the charge itself, are so unsubstantial that it would have been a failure of duty on the part of the judge to have made any other order than that which is here presented for review."

Let us sum up the effect of these authorities.

Take first the matter of personal bias or prejudice. As to this "the facts and reasons" must be given, and those facts and reasons must "*tend to show*" personal bias and prejudice (230 U. S. 43). The judge sought to be disqualified must consider the affidavit and "determine its legal sufficiency" (201 Fed. 872), and "the facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice" (194 Fed. 990).

How is it possible for a judge to decide these matters without acting judicially when doing so?

Take only the language of the Supreme Court (230 U. S. 43) that the affiant must be able to state "facts

and reasons which tend to show personal bias or prejudice''. Probative facts which tend to show an ultimate fact must have such probative value as would justify a judge or a jury in finding the ultimate fact from the probative facts thus adduced. Therefore they require, of their very nature, judicial action to determine their probative value.

In *Cole v. Hebb,* (1834) 7 G. & J. (Md.) 20, 27, it is said that evidence tends to prove a fact ''when a rational common sense intellect might draw from it the conclusion to which by its production it was desired to lead the jury''; or, evidence which tends to prove an ultimate fact is such as will support a verdict rendered thereon, for it is said in *Cummings v. Helena Co.,* (1902) 26 Mont. 434; 68 Pac. 852, ''that which the evidence tends to show must be taken as proved'' upon a motion for nonsuit.

It is clear, therefore, that when an affidavit to disqualify a judge is presented, he is entitled, and it is his duty, to pass upon its legal sufficiency and to determine whether or not the facts and reasons therein set forth *tend to prove* the personal bias or prejudice mentioned in the statute and, if the facts therein stated do not tend to prove that ultimate fact, the affidavit is insufficient.

This is not all, however. In the second place, the judge sought to be disqualified is entitled to determine whether the affidavit has been filed within time and to construe Section 21 of the Judicial Code until the mean-

ing thereof, when settled either in the Supreme Court or by the circuit court of appeals for his circuit, makes the true interpretation thereof no longer a question.

Section 21 of the Judicial Code provides that the affidavit of bias or prejudice "shall be filed not less than ten days before the beginning of the term of the court". What term of court is meant? Is it the term of court at which the case is actually to be brought on for trial, or the first term of court at which it might have been tried? Such questions were acute in days of bygone legislation (*Fisk v. Henarie,* [1892] 142 U. S. 459, 467).

If we assume, however, that the meaning of Section 21 of the Judicial Code is clear, whatever it is, nevertheless as the parties to this action fixed the term at which the cause was to be tried and to pass to a decree, there can be no doubt that this application was not in time. In deciding that the application was not filed in time, and that good cause had not been shown, Judge Van Fleet was acting judicially, for if there is any one subject more than another which involves judicial determination, it is the question when "good cause" has been shown, or has not been shown.

It is clear, therefore, that a judge who sits to hear an application for his own disqualification is engaged in judicial work. The fact that he is under attack (if you please) is simply an adventitious circumstance.

If Congress had been minded to have the question of disqualification of one judge tried by another, it

would have so provided in its legislation. It chose to provide that all questions involved in the application should be determined by the judge sought to be disqualified, and the fact that an attempt is made to disqualify him in the very proceeding before him does not deprive the proceeding of its judicial aspects.

It is obvious that somebody is bound to determine whether the facts stated tend to show personal bias or prejudice, and the Supreme Court has said that that person is the judge sought to be disqualified.

There is nothing in the statute to suggest that the question of the disqualification of a district judge is to be heard and decided by the senior circuit judge. If there were, then he would be called upon, in some cases, to hold that personal bias or prejudice had been made out and, in other cases, that personal bias or prejudice had not been made out. That Congress never contemplated that these matters should be determined by the senior circuit judge is proved by the circumstance, among others, that in districts where there are two district judges one may decide that he is disqualified by a showing of personal bias or prejudice and call in his colleague, and the matter never reach the senior circuit judge.

This argument, however, as it seems to us, is to little purpose, because all discussion is precluded by the determination of the supreme court in *Ex parte American Steel Barrel Co.,* (1913) 230 U. S. 35.

IV.

THE DECISIONS IN THOSE STATES WHERE THE FACTS AND REASONS ARE NOT REQUIRED TO BE STATED RENDER NO ASSISTANCE IN THE INTERPRETATION OF AN ACT OF CONGRESS WHERE FACTS AND REASONS ARE REQUIRED.

During the proceedings before Judge Van Fleet, on April 8, 1916, Mr. How cited four decisions dealing with the laws of Indiana, North Dakota and Oklahoma, where the statute requires a change of judges upon an affidavit that the litigant believes he cannot have a fair trial before the judge presiding.*

These cases may be briefly reviewed, and it is to be noted that each of them involves an appeal from a judgment based upon an order of the trial judge refusing an application for his own disqualification. It is thus to be seen that the error committed was uniformly remedied by appeal and not by mandamus.

Witter v. Taylor (1885), 7 Ind. 110, was an action on a promissory note. A judgment for the plaintiff was reversed because the trial judge erroneously denied an

*The statute so provided when Oklahoma was a territory and the cases from Oklahoma cited by Mr. How are taken from that period. After the admission of the state into the Union, the statute was changed.

In Lewis v. Russell (1910), 4 Okl. Crim. App. 129; 111 Pac. 818, the court deals with the present statute of Oklahoma requiring that the affidavit to disqualify a judge set forth "the grounds or facts upon which the claim is made that the judge is disqualified", and says (p. 819):

> "The facts upon which the claim of prejudice is made must be set out in the application so that the judge and the other side may know what is claimed and upon what the claim is based."

The court, in dealing with the reasons that led to the enactment of the present statute, and the change from the earlier statute which did not require the affidavit to set forth any facts at all but merely the belief of the affiant that he could not secure a fair trial, said, in speaking of the former statute (p. 819):

> "However moderately and justly this power of disqualifying judges may have been exercised before statehood, after the admission of Oklahoma into the Union it was greatly abused", etc.

application for change of judge upon the ground that the judge presiding had been engaged as counsel in the cause.

The court held, quoting from the syllabus:

> "If the affidavit for a change of venue, in a civil cause, is in substantial conformity to the statute, the duty of the Court to grant it is imperative. Counter affidavits are not admissible; nor can the personal knowledge of the judge in relation to the facts sworn to, be allowed to affect the application."

In *State v. Kent* (1895), 4 N. D. 577; 62 N. W. 631, a judgment of conviction of murder was reversed for error in refusing a change of judge.

The statute provided (p. 635, c. 2), "if the accused shall make an affidavit that he cannot have an impartial trial, by reason of bias or prejudice of the presiding judge", there shall be a change of judges.

It was held that

> "on the presentation of an affidavit stating such bias, the right of the accused to have another judge called in to try the case is absolute" (p. 636).

Lincoln v. Territory (1899), 8 Okla. 546; 58 Pac. 730, is a decision by the Supreme Court of the then Territory of Oklahoma, reversing a judgment of conviction in a criminal case upon the ground that *the court erred in refusing a change of judge.*

The syllabus is by the court, and reads as follows:

> "Under St. Okl. 1893, § 5138, as amended by Laws 1895, p. 198, where the accused makes affidavit in which it is positively stated that he cannot have a fair and impartial trial, on account of the bias and

> prejudice of the presiding judge of the court where the indictment or information is pending, and presents it in proper time to the court, it is sufficient. The affidavit need not set up the facts on which it is based, or reasons for the belief of the affiant as to the bias or prejudice of the judge. Cox v. U. S., 50 Pac. 175, 5 Okl. 701, overruled."

The affidavit of disqualification read as follows (p. 730, c. 2):

> "Territory of Oklahoma, Garfield County—ss.: I, Perry B. Lincoln, on oath do solemnly swear that I am the defendant and accused person in this case above entitled, and that I cannot have a fair and impartial trial of this cause before the Hon. Jno. L. McAtee, the presiding judge of this court, by reason of the bias and prejudice of the said Jno. L. McAtee, presiding judge of said court. Perry B. Lincoln. Subscribed and sworn to before me this 8th day of March, 1898. J. C. McClelland, Clerk, by M. A. Alexander, Deputy."

Cox v. United States, (C. C. A., 8th C., 1900) 100 Fed. 293, involved a writ of error to the Supreme Court of the Territory of Oklahoma which had affirmed a conviction in a criminal case notwithstanding a claim by the defendant that he was illegally refused a change of judge.

The Circuit Court of Appeals reversed the case for this assigned error, and said (p. 294):

> "The application of the defendant for a change of judge conformed to the requirements of this statute, and the denial of the application by the trial court, and the affirmance of this ruling by the supreme court of the territory, were error. The statute is plain, unambiguous, and mandatory. Our attention has been called to a late opinion of the

> supreme court of the territory of Oklahoma—Lincoln v. Territory, 58 Pac. 730—in which that court construes the section of the statute we have quoted, and holds, and rightly, as we think, that when the accused makes affidavit that he cannot have a fair and impartial trial, by reason of the bias and prejudice of the presiding judge, it is the duty of the court to order a change of judge, to be effected in the mode provided by the statute, and that a refusal to do so is an error fatal on appeal to any judgment the court may thereafter render against the defendant in the cause."

These cases do not assist in the determination of the questions involved here, and it is to be remembered in reading decisions of state courts respecting mandamus that those decisions are generally referable to a supervisory power over inferior tribunals which is not possessed by the federal courts, as we have already shown.

In addition to this, the affidavit required in some of the states, as in Indiana, North Dakota and, until recently, Oklahoma, gives less scope for judicial determination than an affidavit required by a statute such as Section 21 of the Judicial Code, and there would be more argument for holding that such statutes automatically disqualified the judge than there would be where he was called upon to decide a number of questions clearly judicial in character.

In other words, Section 21 of the Judicial Code requires a litigant to show facts which would authorize a finding of personal bias or prejudice, whereas in the states mentioned all that the litigant is required to do is to say that he believes he cannot have a fair

trial. It is the difference between facts tending to show and mere naked and unsupported belief.

Finally, even in those states where the facts and reasons are not required to be stated, an order refusing a change of judges is generally reviewed upon appeal and not by mandamus.

V.

IN VIEW OF THE MOTION SUBMITTED BY THE PETITIONER TO JUDGE VAN FLEET MARCH 6, 1916, FOR AN IMMEDIATE DECREE OF FORECLOSURE, WHICH IS STILL UNDER ADVISEMENT, AND IN VIEW OF THE PROCEEDING IN MANDAMUS TO COMPEL JUDGE VAN FLEET TO GRANT THAT MOTION BROUGHT IN THIS COURT MARCH 10, 1916, AND HERE MAINTAINED BY PETITIONER UNTIL DECIDED MARCH 29, 1916, THE PETITIONER WILL NOT BE PERMITTED TO EXECUTE A VOLTE-FACE BY ATTEMPTING TO PROHIBIT JUDGE VAN FLEET FROM DOING WHAT IT THUS SOUGHT TO COMPEL HIM TO DO.

The preparations for an attempted disqualification of Judge Van Fleet were under way March 18 to 20, 1916 (Pet., p. 61; also Mr. How's testimony April 7, 1916, p. 94—see p. 15 ante), and were completed by the execution of Mr. Rhoades's affidavit in New York, March 29, 1916, before the petitioner or Mr. Rhoades was aware of the decision of this court handed down that day (p. 13 ante). *Indeed, Mr. Rhoades's affidavit was in all probability executed and mailed before the decision of this court was handed down, for the hour at which it was handed down was 5 p. m., New York time.*

In this connection it is to be noted that the resolution of the reorganization committee requesting that Judge Van Fleet be disqualified was adopted March 20, 1916 (Pet., p. 63).

The question is, therefore, presented whether a litigant can be prosecuting proceedings to compel a judge to act and, at the same time, have in preparation proceedings to prohibit him from acting by disqualifying him.

The case against the petitioner, however, is much stronger than as thus stated. The only occurrences assigned in the affidavit of March 29, 1916, to support the charge of personal bias and prejudice against Judge Van Fleet are (a) the occurrences on or before June 30, 1915, on which day the argument to enjoin the dependent suit in New York was concluded; (b) the opinion handed down and order made February 21, 1916; (c) the occurrences of March 6, 1916, and (d) the occurrences in this court upon the oral argument March 16th and 17th, 1916. If Judge Van Fleet had manifested any bias or prejudice against the petitioner prior to March 6, 1916, the petitioner should not that day have submitted to him a motion for the immediate entry of a decree in foreclosure, involving a determination (a) whether or not an upset price was proper, and (b) if such an upset price were proper, what the amount should be. The petitioner had a long time to think it over. Everything that it relies upon for disqualification down to that date had occurred prior to June 30, 1915, except the handing down of the opinion of February 21, 1916, and, as we shall have occasion to show

later, that circumstance cannot be relied upon as a fact or reason to support a charge of bias or prejudice.

It was conceded by Mr. How (in the proceedings of April 8, 1916, p. 154) that the application immediately to enter a decree of foreclosure had been submitted to Judge Van Fleet and that at the very moment of the filing of the affidavit on April 3, 1916, it was pending before him for determination.

The language used by Mr. How is as follows:

> "Mr. How. Now, it is said that there is a motion pending before this court. There is. The mandamus applied for was a mandamus to this judge and to this court, and it is my attitude, which I hope I have made clear, that although that motion is pending before this court it is *not now pending before this judge.*"

In other words, Mr. How claimed that the filing of the affidavit on April 3, 1916, divested Judge Van Fleet of control over the motion, but that up to that moment the application (upon the initiative and maintenance of the petitioner) was before him for determination.

This concession brings the matter within that portion of the decision in *Ex parte American Steel Barrel Co.* (1913) 230 U. S. 35, which said, in speaking of Section 21 of the Judicial Code (p. 44):

> "It was never intended * * * to paralyze the action of a judge *who has heard the case, or a question in it,* by the interposition of a motion to disqualify him *between a hearing and a determination of the matter heard.*"

Of course, the matter was heard if it was under submission, because the fact that the hearing consisted of a stipulation of the parties that the motion submitted

should be granted does not alter the fact that it was a hearing.

So much for the motion made by the petitioner on March 6, 1916.

The next step took place on March 10, 1916, when the petitioner filed in this court its application for mandamus, the prayer whereof read in part as follows (p. 14):

> "Wherefore your petitioner prays that a rule may be made and may issue from this Honorable Court directing Honorable William C. Van Fleet, Judge of the District Court of the United States for the Northern District of California to show cause before this court why a writ of mandamus shall not issue commanding him and it and each of them to proceed with all convenient speed to a hearing of said cause, * * * to the entry of the decree of foreclosure and sale in the form heretofore as hereinabove set forth submitted to said court by your petitioner * * *."

At the time of the filing of that petition for mandamus the petitioner was well aware of all that had transpired on March 6, 1916, and if the occurrences of that day, coupled with all that had gone before, tended to show personal bias or prejudice against the petitioner, the petition in mandamus to compel the entry of the decree should never have been brought.

The petition, however, was filed, and a return day set. The argument in this proceeding and others occurred on March 16 and 17, 1916. If anything happened on either of these days in the presence of this court which could be drawn upon as a fact or reason tending to show personal bias or prejudice in Judge Van Fleet, the petitioner was well aware of it on

March 17, 1916, when the proceedings were submitted for decision, and should have withdrawn its petition.

Instead of that, the petitioner filed four briefs in the proceedings then submitted, viz., on March 20, 23, 24 and 28, 1916, and it never indicated to this court that it did not wish the petition for a writ of mandamus granted; it did not indicate that it wished to have it withdrawn, and it is, therefore, in the position of having maintained that petition in this court until it was decided March 29, 1916, at 2 p. m., California time. Before that hour of decision arrived, the affidavit relied upon to disqualify Judge Van Fleet had been executed in New York and mailed to California.

We say that, considering all of these circumstances, it is not now proper for the petitioner to maintain a proceeding to prohibit Judge Van Fleet from determining the matters which it sought, uninterruptedly from March 6, 1916, to March 29, 1916, to compel him to determine.

VI.

IT IS INCONCEIVABLE THAT THE PETITIONER WOULD HAVE BEEN PERMITTED TO DISQUALIFY JUDGE VAN FLEET IN THE MATTER OF ENTERING AN APPROPRIATE DECREE OF FORECLOSURE IF THIS COURT HAD ON MARCH 29, 1916, IN TERMS COMMANDED HIM TO PROCEED IMMEDIATELY SO TO DO, AND, AS THAT WAS THE ORDER OF THIS COURT IN SUBSTANCE AND EFFECT, ALTHOUGH NOT IN TERMS, THE POSITION OF THE PETITIONER IS THE SAME.

The opinion of this court handed down March 29, 1916, is summarized at pages 9 to 11 of this brief, and in that opinion this court determined (a) that the

parties to the suit were entitled to the decree in conformity with their motion of March 29, 1916; (b) that in its discretion the court had full power to fix an upset price, and, finally, (c) that the petition for mandamus would not in terms be granted because there was every presumption that the District Court, "being advised of the views of this court will proceed to give the parties full measure of relief".

If this court had in terms directed a peremptory writ of mandate to issue in accordance with the views which it expressed in the opinion, is it conceivable that the petitioner would have been permitted to nullify such a writ of mandamus (procured upon its own petition) by inaugurating a proceeding for the disqualification of Judge Van Fleet on account of matters which occurred before the writ was issued, and which they knew long before the handing down of the opinion and, indeed, before the commencement of the proceeding in mandamus?

We submit that it would not be permitted to do so in the event supposed, and that it will not be permitted to do so in the circumstances as they actually occurred.

VII.

IT WILL BE APPROPRIATE TO A FULL UNDERSTANDING OF THIS PROCEEDING TO CONSIDER IN THE ABSTRACT: (a) THE QUESTION OF UPSET PRICE, AND (b) THE DUTIES OF A TRUSTEE OF A BOND ISSUE.

(a) The question of upset price.

The fixing of an upset price in many cases is absolutely vital to the protection of minority bondholders.

If a railroad property is foreclosed and its reputed value is far below the amount of the bond issue, there is no hope of getting an outside purchaser except through negotiation with the majority bondholders. In other words, the majority bondholders determine whether they will themselves buy the property or suffer an independent purchaser to buy it. This being the case, no sale of the property is possible except to the majority bondholders or to someone bidding by their procurement or with their consent. Unless, therefore, minority bondholders are protected by the court by an upset price or through an order setting aside a sale for a grossly inadequate price, there is no protection whatever for the minority bondholder.

If it be said that the minority bondholder can join the majority, the answer is that he may not desire and ought not to be compelled to do so. If an investor buys railroad bonds at, say, 92, and the bonds fall into default, the minority bondholder is entitled to realize *in cash* his pro rata of a fair selling price of the property, and it is the duty of a court of equilty to protect him in that right.

When an investor purchases bonds he assumes that he is obtaining commercial paper of the highest quality, and he ought not to be forced against his will to take stock in a reorganized company *if the property has any value whatever.*

We very well appreciate that properties may come under foreclosure which have no fair selling value and where the reorganization has been brought about to hold the property for the benefit of the bondholders

until it has a selling value of some amount. It rarely happens, however, that property under foreclosure has no selling value whatever. We may illustrate this with what Mr. Bowie said in his argument on March 16, 1916 (p. 82), when speaking for and of the reorganization committee:

> "And we calculated, I believe, that if the Western Pacific were sold for somewhere between $15,000,000 and $20,000,000, on the basis on which the securities of that road are selling today, *and the basis on which the road is earning to-day,* we would be entitled to a judgment against the Denver for somewhere between $20,000,000 and $25,000,000 in a lump sum; that is, a judgment for a lump sum for damages for breach of their contract of guarantee, because we would not have to wait for each installment, but we could obtain all the relief in an equitable action."

Let us, therefore, suppose a road with a first-mortgage bond issue of $50,000,000 and a property worth, we shall assume, at least from $15,000,000 to $20,000,000. How is a court of equity to secure such a bid except by fixing an upset price? If no upset price is fixed and the majority bondholders should bid in the property at, say, $1,000,000, would a court of equity not set aside the sale; and, if it would set aside the sale for gross inadequacy of selling price, should it not in advance fix an upset price fair to the majority and the minority alike?

(b) The duties of a trustee of a bond issue.

We all know that the trustee of a bond issue is generally selected (a) by the mortgaging company or by the proprietors of that company, or (b) by the bankers or capitalists who engage to buy or float the issue. It

is true that when a trust company becomes the trustee of a bond issue it thereby assumes a duty to *all the bondholders.* We know that in trust deeds it is provided that the trustee shall be obliged to take specified action when requested by the holders of a given percentage of the outstanding bonds, and we also know that that percentage is frequently made so high as to make concerted action on the part of the minority bondholders impossible. There is reason in making it the mandatory duty of a trust company to respect the wishes of the holders of a given percentage of the bond issue, because the bondholders and not the trust company bought the bonds. No complaint, therefore, could be made of a trust company which obeyed the directions of a majority of the bondholders as against the protest of a minority, in those matters in which it was provided that the rule of the majority should prevail.

All this, however, is but introductory to the proposition which we are approaching, and that is, that in the reorganization of bankrupt enterprises the majority bondholders often organize to become the purchaser of the property at foreclosure, and when they do so, they do or may come into conflict with the views and interests of the minority. In that case a controversy ensues. The majority, however, in the case supposed, are not to be considered as bondholders but as purchasers, and in such an instance the trustee cannot obey the majority bondholders as proposed purchasers, for the moment that it does so it comes into conflict with the interests of the minority bondholders and ceases to represent *all* the bondholders because it cannot represent the majority as purchasers seeking a low upset price and the minority as vendors seeking a high upset price.

We do not say (because we have not fully considered the question) that the trustee is bound to stand aloof from any reorganization of majority bondholders organized for the purpose of acquiring the property, but we are free to say that it may be imprudent for a trustee to identify itself with reorganization plans. If, however, the trustee does align itself with the majority and becomes a part of a syndicate for the purchase of the property at foreclosure, it becomes impossible for it to have any position in respect of the upset price except that of the majority bondholders, whose position, however, is not that of bondholder but of intended purchaser.

In the event supposed, therefore, the trustee *as trustee* would have no interest in the fixing of an upset price, which would be fair as between the majority as proposed purchasers and the minority claiming the right to realize a pro rata of the fair selling price of the foreclosed properties.

With these preliminary observations we pass to to our next point.

VIII.

THE PETITIONER HAS NO SUCH SUBSTANTIAL INTEREST IN THE QUESTION OF THE UPSET PRICE AS WOULD JUSTIFY AN APPLICATION UPON ITS PART IN ITS CAPACITY AS TRUSTEE TO DISQUALIFY JUDGE VAN FLEET FROM HEARING AND DETERMINING THAT QUESTION.

The only question invovled in entering a decree of foreclosure here is that of an upset price, and the petitioner has no such substantial interest in that question

as would justify a proceeding by it to disqualify Judge Van Fleet.

In *Estate of Whitson* (1886), 89 Mo. 58; 1 S. W. 125, the widow in an estate sought a change of judges upon the ground of prejudice, but her application was denied. In affirming the action below, it was said:

> "This application might well have been refused on the ground that the *person making it had no interest to be affected* either by the approval or disapproval of the report of sale."

In *Omaha Co. v. O'Neill* (1890), 81 Iowa 463; 46 N. W. 1100, suit was brought against a judgment creditor and the sheriff to prevent a sale of property under execution. The sheriff attempted to procure a change of venue which was refused on the ground that he had no personal interest in the action.

The theory which underlies Section 21 of the Judicial Code is that the litigant who seeks to disqualify the judge has a question pending before him into the decision of which his bias or prejudice may enter. It is important, therefore, in every case, to ascertain whether the litigant is *interested* in a question before the judge, the proper disposition of which may be affected by the bias or prejudice of that judge.

We are, therefore, called upon now to consider what is the question in which the petitioner is interested and how the bias or prejudice of Judge Van Fleet will affect the disposition of that question. It is clear that the only question is that of upset price. How is the

petitioner interested in that question? In the proceedings of March 6, 1916, Mr. How said (pp. 4, 5, ante):

> "Mr. How. I also ought to call attention to the fact that *there is a blank in the form of decree* presented to the court, or rather, suggested to the court, and covered by the motion which has been made, *for the fixing of an up-set price.* In that regard I do not think that I ought to refrain from saying that my conception of *the duty of the trustee is to take absolutely no part as to the up-set price which this court may see fit to set,* excepting that it holds itself liable to furnish the court such information as it may for the aid of the court. *The only suggestion that I think the trustee is entitled to make with any propriety is that the up-set price shall not be put at such figure as will make a sale impossible, as will not produce a bidder. What that figure is, I do not know.*"

It would seem from the foregoing, considering (a) that the majority bondholders as proposed purchasers of the property desire a low upset price, and (b) that the minority bondholders wish to get a high upset price, that the position of the trustee, as Mr. How suggested on March 6, 1916, is necessarily advisory and not litigious.

This, however, is not all that Mr. How has said on the question of upset price. In the argument made by him in this court March 16, 1916, Mr. How said (tr. p. 12), when speaking of the occurrences before Judge Van Fleet on March 6, 1916:

> "The solicitor for the plaintiff—myself—then moved the court that a decree of foreclosure and sale in the form submitted should be entered forthwith; and, in the alternative, and if that motion should be denied, that the cause be set for hearing

and for the entry of such decree at such early day as the court should assign. The reason for the alternative motion was that the parties to the stipulations did not assume to fix the up-set price, if an up-set price should be desirable, in the decree. That obviously is a matter in the discretion of the court and which we did not seek to deprive it of. If the court thought it was a proper case for an up-set price—*and I should think he would not think it was*—the alternative motion left it open to him to set the cause for hearing for the purpose of determining the up-set price which he would demand."

It was in this same argument of March 16, 1916, (tr. p. 82), that Mr. Bowie made the statement which we have already quoted but which we here repeat:

"And we calculated, I believe, that if the Western Pacific were sold for somewhere between $15,000,000 and $20,000,000, on the basis on which the securities of that road are selling today, and the basis on which the road is earning to-day, we would be entitled to a judgment against the Denver for somewhere between $20,000,000 and $25,000,000 in a lump sum; that is, a judgment for a lump sum for damages for breach of their contract of guarantee, because we would not have to wait for each installment, but we could obtain all the relief in an equitable action."

We come now to Mr. Rhoades's affidavit, made March 29, 1916. Speaking of the bonds represented by the reorganization committee, Mr. Rhoades says in his affidavit (Pet. p. 26):

"It is, and at all times has been, the desire of the said bondholders (hereinafter called the majority bondholders) that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that

the same shall be purchased in the interests of such of the bondholders as may join in said Plan of Reorganization."

Mr. Rhoades also says (Pet. p. 31):

"It is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible price for the mortgaged property. The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price. The duty of the Trust Company is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements of value and all qualifying factors being considered,—no more and no less—and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge has constituted himself the special guardian and champion of said minority bondholders."

In connection with the upset price, Mr. Rhoades also says (Pet. p. 30):

"In connection with the entry of the decree of foreclosure and sale to be entered in this cause, said Judge if he were permitted to pass upon the matter *would have to determine and fix the up-set price to be named in said decree,* that is to say the minimum amount for which the mortgaged property may be sold under such decree."

We now come to April 3, 1916, when Mr. Rhoades's affidavit was filed.

After the affidavit had been read to Judge Van Fleet, the following occurred:

"Mr. How. Your Honor, I have no further duty to perform and cannot be of any more assistance to the Court.

Mr. Madison. If your Honor please, the Savings Union Bank & Trust Company has up this morning an amended petition for leave to intervene here for the purpose of being made a party to the record for the purpose of introducing evidence in order to aid the Court in arriving at an up-set price. As I understand it, the only point now before this Court at the present time, assuming that the Circuit Court of Appeals' opinion is final will be the signing of a decree and fixing an up-set price. The plaintiff in the case admits that there should be an up-set price fixed, and the affidavit so recites. All the parties to the case agree that there should be an up-set price——

Mr. How. *Don't claim that I am bound by any such statement as that. I don't admit it. I don't think it is a proper case for an up-set price, never have and shall not to the end. I think the Court has the power to fix an up-set price.*

Mr. Madison. The proposed decree drawn up by Mr. How and submitted by Mr. How on behalf of the Equitable Trust Company contains a provision providing for an up-set price and simply leaving a blank for the amount to be filled in. Am I correct about that, Mr. How?

Mr. How. Quite correct.

Mr. Madison. And at the time this matter was presented Mr. How said he thought it was a proper case for an up-set price. He had nothing to say however upon that point.

I think this is a case where an up-set price should be fixed and I would be glad to argue that point at the proper time. There is no objection, as I can see, to the form of the decree and nothing before the Court but the fixing of the up-set price."

It is evident that Mr. Rhoades and Mr. How are at cross purposes in respect of the question of an upset price. Mr. Rhoades says that it is the duty of the Trust Company "to compel the majority bondholders

to pay the full and true value of the property at the time of sale, all elements of value and all qualifying factors being considered—no more and no less—and this duty the Trust Company is prepared and intends fully to perform", while Mr. How says "I don't think it is a proper case for an upset price, never have and shall not to the end."

During the hearing before Judge Van Fleet on April 7, 1916, frequent reference was made to Mr. How's remark of March 6, 1916:

> "My conception of the duty of the trustee is to take absolutely no part as to the up-set price which this court may see fit to set" (p. 5, ante).

On April 8, 1916 (p. 153), Mr. How made the following comment:

> "Mr. How. Will the court permit me a very few minutes? I seldom attempt to explain any misapplication or misconstruction of any remarks that I have made if the record shows that it is a misapplication and a misconstruction. But in this case there has been such a persistent lack of fair representation of some remarks that I have made that I think I ought to claim the privilege of explaining them.
>
> I did say that it was my conception of the functions of the Trustee that it should not take any part in the fixing of an upset price so long as the price was fixed so that it might obtain a bidder and effect a sale and complete the remedy which it sought. I made that on page 705 of the transcript of the record. At page 725 there appears a minority bondholder with a big stick, with an affidavit claiming that the property is worth $40,000,000 and putting the trustee, in its judgment if that should be accepted, in a position where it would be impossible

> to obtain a bidder, and putting it also in a position where it would have to protect a part of the bondholders against assault on the part of others. From that moment the Equitable Trust Company had a positive duty as Trustee to see, as it expresses in its affidavit, that the property should be sold for what it was economically worth, all factors of value being considered and all qualifications upon that value being considered."

We think we have thus stated all that has been said by the petitioner in respect of its duties and interests as trustee concerning an upset price.

Considering that the majority bondholders are organized to buy the property at the lowest possible price against the interests of the minority bondholders who are seeking to get the highest possible upset price, we think that the trustee, as trustee, has no position whatever in the matter, regarding it as a mere question of abstract law.

Considering the facts, it would seem to be clear that if the trustee, standing aloof, is entitled to enter the controversy as a third interested party (counting the majority bondholders and the minority bondholders as two) nevertheless it has abandoned that possibility by becoming identified with the reorganization committee. Mr. Alvin W. Krech is the president of the petitioner (Case No. 2755, Exhibit 4, p. 121), and Mr. Lyman Rhoades is not only a vice-president of the company but as that officer of the petitioner has charge of this very litigation (p. 13, ante). At the same time, Mr. Krech is the chairman of the reorganization committee and Mr. Rhoades is its secretary (Case No.

2755, Exhibit 26). Thus, the president and the vice-president of the Trust Company, whose duty it is (according to Mr. Rhoades's affidavit) to compel the majority bondholders "to pay the full and true value of the property at the time of sale", are also the chairman and secretary of the reorganization committee, and represent the majority bondholders whose interest it is (according to Mr. Rhoades's affidavit) "to obtain the mortgaged property for the lowest possible price".

It is clear, therefore, that by its own voluntary and deliberate act, the Trust Company has become identified with the reorganization committee and that it cannot claim to represent the minority bondholders in fixing the upset price. What interest, then, has it in the matter of the fixing of the upset price? Is it to oppose the minority that they may not succeed in procuring too high an upset price, or is it to oppose the majority that they may not procure too low an upset price or no upset price at all?

We say the position of the trustee as trustee is to do neither the one nor the other. If abstractly it had no duty but to stand aloof, nevertheless it has so shaped its course as to make it obligatory in law that it be deemed and treated as a litigant allied with the majority bondholders and against the minority bondholders in the matter of the upset price. In this aspect of the case we submit it is in no position *as trustee* for *all* the bondholders to challenge the fairness of Judge Van Fleet, or his capacity fairly to hear and determine the questions relating to an upset price.

The trust deed so providing, it was a perfectly legitimate exercise of power for the majority bondholders to give the trustee directions in respect of its course

(including an attempt to disqualify Judge Van Fleet) in respect of (a) proceedings to bring in the Denver & Rio Grande and Missouri Pacific, etc., and (b) the prosecution of the dependent suit in New York; and, in obeying the directions of the majority bondholders in these matters, the trustee would be deemed to represent *all* the bondholders. In other words, in the case supposed, what was to the interest of *all* the bondholders would be deemed to be properly determinable by the majority bondholders, because the trust deed so provided.

In respect of the upset price, however, the case is entirely different. *The majority bondholders, so far as the upset price is concerned, are to be regarded as a proposing purchaser only.* The fact that this proposing purchaser is a majority of the bondholders is an adventitious circumstance.

Considering the matter from this aspect, the proposing purchaser has no authority to instruct the trustee to take a position in respect of the upset price in accordance with the desires of the proposing purchaser and against the interest of the minority bondholders. In such a case, the majority bondholders cannot possess the power of decision not only for themselves but for all other bondholders as well, for, the majority bondholders being the proposing purchaser and the minority bondholders desiring a high upset price, their interests clash.

Ordinarily, in such a contingency the trustee would stand neutral, but in the present case the trustee has become identified with the majority bondholders in their

role as proposing purchaser. Under these circumstances, it will not be regarded as being even neutral, but must be ranged and identified in interest with the proposing purchaser.

Under these circumstances, it is impossible for it in its capacity as trustee, and claiming to represent *all* the bondholders, to move the court for the disqualification of the judge as a measure necessary to secure justice to it *as trustee,* representing *all* the bondholders.

IX.

MANDATE SHOULD BE DENIED UPON THE GROUND THAT THE PETITIONER ABUSED THE PRIVILEGE GIVEN BY SECTION 21 OF THE JUDICIAL CODE BY FILING AN AFFIDAVIT IN RESPECT OF ISSUES WHICH DID NOT EXIST WHEN THE AFFIDAVIT WAS FILED.

This affidavit was based upon the continued existence of the controversies in this case which were under advisement in this court at the time of the making of the affidavit. When the opinion of this court came down, those controversies became obsolete. The affidavit is based largely upon the existence of those controversies and upon the allegations of the petitioner therein contained that the controversies were subsisting when, in point of fact, at the time of the filing of the affidavit the petitioner knew, and it was the fact, that those controversies had ceased to exist. Under the circumstances, it was highly improper to file such an affidavit because it was in large part irrelevant. This will be seen by a reference to paragraph III of the affidavit (Pet. pp. 21-23).

It has been frequently decided that the inclusion of matter wholly irrelevant and immaterial in an affidavit to disqualify a judge constitutes contempt.

See:

In re Jones (1894), 103 Cal. 397;

Works v. Superior Court (1900), 130 Cal. 304;

Lamberson v. Superior Court (1907), 151 Cal. 458;

Webb v. Superior Court (Cal. App. 1915), 152 Pac. 957.

If, therefore, this affidavit, as we contend, is made up, in large part, of matter irrelevant to the state of facts which existed when it was filed, that is a sufficient reason for rejecting the application both below and here.

See:

Board of Supervisors v. Supervisor (1892), 94 Mich. 386; 54 N. W. 169, 170;

Bashore v. Superior Court (1907), 152 Cal. 1, 3;

United States v. Fisher (1911), 222 U. S. 204.

X.

INASMUCH AS THIS APPLICATION WAS NOT MADE WITHIN THE TIME SPECIFIED IN SECTION 21 OF THE JUDICIAL CODE IT BECAME NECESSARY FOR THE PETITIONER TO SHOW CAUSE FOR THE DELAY, AND IF THERE BE ANY CONCEIVABLE THEORY ARISING FROM THE FACTS WHICH WOULD JUSTIFY A JUDGE IN HOLDING THAT GOOD CAUSE FOR THE DELAY WAS NOT SHOWN, THE PETITION FOR MANDAMUS MUST BE DENIED.

We think that this proposition is self-evident, and that under the facts which we have heretofore discussed

any judge would be justified in holding that good cause had not been shown for failure to act within the time specified in Section 21 of the Judicial Code.

As we shall see later, practically all of the matters dealt with in the affidavit, save occurrences in the District Court February 21, 1916, and March 6, 1916, and in this court March 16 and 17, 1916, transpired on or before June 30, 1915, and Mr. How, counsel for the petitioner, knew thereof as and when they occurred (Pet. p. 59).

It is held in *Crosby v. Blanchard* (1863), 89 Mass. (7 Allen) 385, that "an objection that a judge is not impartial must be taken at the trial *if then known to the counsel who conducts the case; otherwise neither he nor his client can afterwards take advantage of it*", and this decision is cited with approval in *Coltrane v. Templeton* (C. C. A., 4th C., 1901), 106 Fed. 370, 377, and *Utz Co. v. Regulator Co.* (C. C. A., 8th C., 1914), 213 Fed. 315, 319.

XI.

IN CONSIDERING MR. RHOADES'S AFFIDAVIT IT IS TO BE REMEMBERED THAT THE RIGHT TO MAKE AN APPLICATION TO DISQUALIFY A JUDGE IS WAIVED BY FAILURE TO ACT PROMPTLY.

White v. Jouett (1912), 147 Ky. 197; 144 S. W. 55, 60;

Tolliver v. Commonwealth (1915), 165 Ky. 512; 176 S. W. 1190;

German Insurance Co. v. Landram (1889), 88 Ky. 433; 11 S. W. 367;

Massie v. Commonwealth (1892), 93 Ky. 588; 20 S. W. 704;

McDonald v. Wallsend (1909), 135 Ky. 624; 117 S. W. 349;

Louisville Ry. v. Mitchell (1910), 138 Ky. 190, 192; 127 S. W. 770;

Pittsburgh Ry. v. Austin's Administrator (1911), 141 Ky. 722, 725; 133 S. W. 780, 784;

Nicholls v. Barrick (1900), 27 Colo. 432, 439; 62 Pac. 202;

Everville v. Leadville Co. (1901), 28 Colo. 241; 64 Pac. 200, 201;

State v. Clifford (1911), 65 Wash. 313, 316; 118 Pac. 40, 41;

Ingles v. McMillan (1911), 5 Okl. Crim. 130, 143; 113 Pac. 998, 1003;

Yazoo R. R. v. Kirk (1912), 102 Miss. 41, 55; 58 So. 710, 713;

See also

Washoe Copper Co. v. Hickey (1912), 46 Mont. 363; 128 Pac. 584;

Hutchinson v. Manchester Ry. (1905), 73 N. H. 271; 60 Atl. 1011, 1014;

Coltrane v. Templeton (1901), (C. C. A., 4th Ct.), 106 Fed. 370.

XII.

THE RECEIVERS AND THEIR COUNSEL ARE NOT PARTIES WITHIN SECTION 21 OF THE JUDICIAL CODE; AND IN VIEW OF THE MATTERS DISPOSED OF BY THIS COURT MARCH 29, 1916, THEY COULD NOT BE SAID TO HAVE BEEN PARTIES WITHIN THE THEORY OF MR. RHOADES'S AFFIDAVIT.

In Mr. Rhoades's affidavit it is claimed not only that Judge Van Fleet has a personal bias and prejudice against the petitioner but that he has also a bias and prejudice in favor of the receivers and their counsel.

The affidavit proceeds upon the theory that there were controversies between the petitioner, on the one hand, and the receivers and their counsel, on the other, in respect of (a) the prosecution of the dependent suit; (b) the bringing in of the Denver & Rio Grande and the Missouri Pacific Companies, and (c) the immediate entry of a decree.

The controversy in respect of the immediate entry of the decree depended upon the validity of the order of February 21, 1916.

The entire affidavit, therefore, shows that the only controversies sought to be stated in the affidavit were the controversies dealt with in the order of February 21, 1916; and inasmuch as that order had been annulled by this court in its opinion of March 29, 1916, all controversies with the receivers and their counsel mentioned in the affidavit came to an end before the filing of the affidavit on April 3, 1916.

It could not properly have been said that the receivers and their counsel were ever parties to the controversy, but, if they had been in the abstract, the con-

troversy terminated and there was no matter between them and the Trust Company for adjudication when the affidavit was filed.

In the proceedings of March 6, 1916, Mr. How persistently maintained the position that the receivers were not parties (Case No. 2757, Petition Exhibit 24, p. 5 middle, p. 13 foot), and this was followed up by a similar and successful contention in this court, resulting, as it did, in a holding by the court that they were not parties.

This should dispose of all the matters in the affidavit predicated upon the idea that the receivers and their counsel were parties to the action or to any controversy therein.

XIII.

THE SAVINGS UNION BANK AND TRUST COMPANY IS NOT A PARTY TO THE ACTION.

The Savings Union Bank and Trust Company filed a petition for leave to intervene March 16, 1916, and this petition has never been granted.

Under these circumstances, the Savings Union Bank and Trust Company cannot be regarded as a party to the action.

Indeed, it is the theory of the petitioner that the Savings Union can and should be heard in respect of the upset price *without permitting it to become a party to the cause,* for it is stated in Mr. Rhoades's affidavit (Pet. p. 40):

> "On said 6th day of March, 1916, after the application for said decree, * * * said Savings Union applied for leave to be heard concerning

the fixing of an up-set price in connection with said decree—a subject concerning which, as I am informed, courts are accustomed to receive the views of interested parties without permitting them to become parties to the cause."

XIV.

IN CONSIDERING THE LEGAL SUFFICIENCY OF THE AFFIDAVIT OF MR. RHOADES, WE ARE TO DISMISS (a) MATTERS ALLEGED UPON INFORMATION AND BELIEF; (b) MATTERS THEREIN STATED IN POSITIVE FORM, IF IT APPEAR IN TERMS BY THE AFFIDAVIT ITSELF THAT HE HAD NO PERSONAL KNOWLEDGE IN RESPECT THEREOF; (c) MATTERS THEREIN STATED IN POSITIVE FORM, IF IT APPEAR BY FAIR INFERENCE FROM OTHER FACTS STATED IN THE AFFIDAVIT ITSELF THAT HE HAD NO PERSONAL KNOWLEDGE IN RESPECT THEREOF; (d) MATTERS THEREIN STATED IN POSITIVE FORM, IF IT BE SHOWN DEHORS THE AFFIDAVIT THAT THEY RELATE TO MATTERS OF WHICH MR. RHOADES HAD NO PERSONAL KNOWLEDGE; (e) STATEMENTS THEREIN RESPECTING RECORDS AND PROCEEDINGS IN COURT IN SO FAR AS THOSE RECORDS AND PROCEEDINGS CONTRADICT THE STATEMENTS OF THE AFFIDAVIT; AND, LASTLY, (f) FACTS WHICH RELATE TO AN IMPUTED BIAS AND PREJUDICE IN RESPECT OF THE CONTROVERSIES AS CONTRADISTINGUISHED FROM A PERSONAL BIAS OR PREJUDICE RESPECTING THE LITIGANT.

We shall dwell upon these matters very briefly.

(a) Matters alleged upon information and belief.

See:

Schmidt v. Mitchell (1897), 101 Ky. 570; 41 S. W. 929, 934;

Gay v. Torrance (1904), 145 Cal. 144, 150;

Crouch v. Dakota Co. (1904), 18 S. D. 540; 101 N. W. 722;

Davis v. Atkinson (1905), 75 Ark. 300; 87 S. W. 432, 433;

White v. Jouett (1912), 147 Ky. 197; 144 S. W. 55;

People v. Ford (1914), 25 Cal. App. 388; 143 Pac. 1075, 1077.

(b) Matters therein stated in positive form, if it appear in terms by the affidavit itself that Mr. Rhoades had no personal knowledge in respect thereof.

See:

Cook v. De La Garza (1855), 13 Tex. 431;

Crowns v. Vail (1889), 51 Hun 204;

Hodgman v. Barker (1891), 60 Hun 156;

Ferris v. Commercial Nat. Bank (1895), 158 Ill. 237;

James E. Pepper Dis. Co. v. Alexander (1907), 137 Ill. App. 369;

2 Cyc., 24.

(c) Matters therein stated in positive form, if it appear by fair inference from other facts stated in the affidavit itself that Mr. Rhoades had no personal knowledge in respect thereof.

See cases in the preceding paragraph.

(d) Matters therein stated in positive form, if it be shown dehors the affidavit that they relate to matters of which Mr. Rhoades had no personal knowledge.

Although there is no authority to the point that it will be fatal to an affidavit to disqualify a judge if it

be shown by evidence dehors the affidavit that the matters therein stated in positive form were not within the personal knowledge of the affiant, nevertheless we believe this to be a sound and a true rule. It is within the philosophy which underlies the rules that we have already invoked, and in their logical extension this should be declared to be the law.

(e) Statements therein respecting records and proceedings in court, in so far as those records and proceedings contradict the statements of the affidavit.

See:

16 Encyc. Pl. & Pr., 566;
People v. Shaw (1852), 13 Ill. 582.

(f) Facts which relate to an imputed bias and prejudice in respect of the controversies, as contradistinguished from a bias or prejudice personal to the litigant.

Estate of Dolbeer (1908), 153 Cal. 652, 656, holds that opinions acquired in the course of litigation in respect of the merits of the controversies involved cannot give rise to a claim of personal bias or prejudice.

See also:

Western Bank of Scotland v. Tallman (1862), 15 Wis. 92, 94;
Conn v. Chadwick & Co. (1880), 17 Fla. 428, 440;
Bent v. Lewis (1884), 15 Mo. App. 40, 44;
Purvis v. Frink (1908), 55 Fla. 715; 46 So. 171, 172;
McDonald v. Wallsend Co. (1909), 135 Ky. 624; 117 S. W. 349;
State v. Superior Court (1914), 82 Wash. 420; 144 Pac. 539.

XV.

A CAREFUL ANALYSIS OF MR. RHOADES'S AFFIDAVIT WILL SHOW THE FACTS AND REASONS STATED BY HIM DO NOT SUPPORT THE CLAIM THAT JUDGE VAN FLEET HAS ANY PERSONAL BIAS OR PREJUDICE AGAINST THE PETITIONER OR IN FAVOR OF THE RECEIVERS OR THEIR COUNSEL OR THE SAVINGS UNION.

Mr. Rhoades's affidavit takes up forty-four pages of the record (Pet., pp. 19-64).

In analyzing the allegations which bear upon the alleged personal bias or prejudice of Judge Van Fleet it is important to keep in mind a number of dates, as follows:

(a) March 2, 1915, this action was commenced;

(b) March 3, 1915, the receivers were appointed;

(c) March 8, 1915, Mr. Partridge was appointed counsel for the receivers;

(d) March 26, 1915, the petitioner filed its ancillary bill in New York;

(e) May 27, 1915, the petitioner brought its ancillary dependent action in New York;

(f) June 10, 1915, Judge Van Fleet made an order requiring the petitioner to show cause why the dependent suit should not be dismissed or its prosecution stayed, and restrained the prosecution of the suit in the meantime;

(g) June 28 to 30, 1915, arguments were made upon this matter and upon the propriety of making the Denver & Rio Grande a party defendant;

(h) December 6, 1915, counsel for the petitioner filed its brief resisting the proceeding which had been argued June 28 to 30, 1915;

(i) December 20, 1915, counsel for the Denver & Rio Grande Railroad, appearing as *amicus curiae,* by permission of court filed a brief on the same matter;

(j) December 24, 1915, counsel for the reorganization committee handed Judge Van Fleet a copy of the plan of reorganization;

(k) December 27 to 31, 1915: In reply to the brief of counsel for the Denver & Rio Grande, appearing as *amicus curiae,* two briefs were filed; one by Mr. Partridge on December 27, 1915, and one by Mr. How on December 31, 1915. On the last named day, the matters which had been argued June 28 to 30, 1915, were submitted for decision;

(l) February 21, 1916, order was made staying the prosecution of the dependent bill, and bringing in the Denver & Rio Grande and Missouri Pacific Companies as parties defendant;

(m) March 6, 1916, application was made to Judge Van Fleet immediately to enter decree of foreclosure;

(n) March 6, 1916, application to this court for prohibition, restraining the order bringing in new parties, and alternative writ issued returnable March 16, 1916;

(o) March 9, 1916, appeal taken from order restraining prosecution of dependent suit in New York;

(p) March 10, 1916, petition for mandamus to compel immediate entry of decree;

(q) March 13, 1916, Savings Union filed its petition for leave to intervene, following its oral application of March 6, 1916.

(r) March 16 and 17, 1916, argument of three proceedings before this court and their submission for decision;

(s) March 18, 1916, Mr. Rhoades arrived in San Francisco, having left New York on the 14th;

(t) March 18 to 20, 1916, Mr. Rhoades engaged in preparing affidavit for disqualification;

(u) March 20, 1916, reorganization committee requested trustee to disqualify Judge Van Fleet;

(v) March 20, 1916, Judge Van Fleet announced that he would take no steps in the case until this court decided the matters under submission;

(w) March 20, 1916, Mr. Rhoades left for New York;

(x) March 29, 1916, Mr. Rhoades made his affidavit and mailed it to San Francisco;

(y) March 29, 1916, this court handed down its decision;

(z) April 3, 1916, affidavit to disqualify Judge Van Fleet filed.

With these dates before us we proceed briefly to consider the facts and reasons set forth by Mr. Rhoades, and we ask the court in reading the affidavit to keep in mind Point XIV, in which the authorities are collected which require that certain stated matters be retired from consideration.

We also ask the court in reading the affidavit, to keep in mind paragraph III of Mr. Rhoades's affidavit where he sets forth the matters which are pending in this court, and because of which he desires the disqualification of Judge Van Fleet (Pet., pp. 21, 23), and to contrast the controversies thus set forth in Mr. Rhoades's affidavit made March 29, 1916, with the matters which were in controversy on April 3, 1916, as they are stated in the body of the petition herein (Pet., p. 16, top). With these matters in mind it will not be difficult, though it is somewhat laborious, to give proper consideration to the matters set forth in Mr. Rhoades's affidavit. This we proceed to do.

We shall deal with these matters, not as they are arranged in the affidavit but as nearly as possible, in chronological order.

(a) Alleged bias and prejudice against petitioner.

1. On March 1, 1914, and September 1, 1914, Judge Van Fleet's wife and children owned nine bonds (p. 32). These were disposed of about a week before the commencement of this action (p. 33).

The trustee knew when it filed this bill that on March 1, 1914, and again on September 1, 1914, nine bonds (taking Mr. Rhoades's affidavit as true) were owned by the judge's wife and children, because the income tax certificates made that known to it.

Whether it was also aware when it commenced this action that those bonds had been sold, we cannot know because the affidavit does not so state, but we presume that it did.

Considering that the trustee and its counsel (because we assume that its counsel had like information) knew thirteen months before the filing of the disqualifying affidavit that these bonds had been held and sold, and considering that Judge Van Fleet so stated in open court June 29, 1913 (Pet., p. 32), why was that fact introduced into the disqualifying affidavit? Presumably, to connect the circumstance with the allegation (p. 34, foot) that the "holders of Western Pacific First Mortgage bonds generally (both minority and majority bondholders) have felt that the Denver Company is responsible for the losses which they have suffered through the purchase and subsequent depreciation of said bonds"; in other words, to show a grievance against the Denver Company, and an attempt to tie the Denver Company to the reorganization committee, and to identify the trustee with that committee. This, we suggest, is far-fetched, and, considering that the controversies involving the Denver Company fell out of this litigation before the filing of the affidavit, the allegation should be dismissed altogether.

2. The sister-in-law of Judge Van Fleet holds three bonds which she owned before the commencement of the action.

When the petitioner learned of this fact is not stated, but we presume it learned of it about March 1, 1914, or September 1, 1914.

This allegation was introduced for the same reason as the one just dealt with, and deserves the same treatment.

3. March 3, 1915 (precisely thirteen months before the filing of the disqualifying affidavit), Judge Van Fleet refused to appoint Mr. Olney sole receiver, but appointed him and Mr. Frank G. Drum as joint receivers.

Can judicial action of that nature be made the predicate of personal bias or prejudice?

4. March 8, 1915, Judge Van Fleet appointed Mr. Partridge counsel for the receivers (pp. 37-38), although he "had formerly been a partner in the firm of which said Partridge is a member", and although his son was and is "an attorney employed by *and associated with* said Partridge in his private practice".

What is meant by these statements? Judge Van Fleet while at the bar had been a partner in a law firm and, after he had ceased to be a member of that firm, Mr. Partridge became a member of it. This is the allegation. Is any deduction to be drawn from it?

Let us next take the allegation that his son was "an attorney employed by *and associated with* said Partridge".

Of course, if Judge Van Fleet's son was employed by Mr. Partridge he was associated with Mr. Partridge. A careful examination of the allegation shows that it means only that he was employed by Mr. Partridge. We assume that that was all that was meant, but the language might suggest that the relation was not one of mere employment, which is all that is directly alleged.

This was known to the petitioner for a year. Mr. How testifies (Proceedings April 7, 1916) that he knew it from the first day he went to Mr. Partridge's office because Mr. Van Fleet's name is upon the door (Proceedings April 7, p. 96), and, in terms, he admitted and conceded, for the purposes of the examination, that he had known it at least six months (p. 97).

5. We come now to the commencement of the dependent suit May 27, 1915. This was ten months before the disqualifying affidavit was filed.

The allegations are (in positive form, although Mr. Rhoades was in New York) that the judge "displayed resentment at the Trust Company's action in commencing the same without his permission" (p. 28); that Frank G. Drum, receiver, and John S. Partridge, counsel, were greatly disturbed by the commencement of the dependent suit and regarded the same as an affront to the judge and themselves; that the judge and counsel for receivers have "on several occasions, reiterated and emphasized" that the dependent bill was brought without permission of the judge and without authority from him (p. 30), and that Mr. Rhoades is "informed" and "verily believe [s], that said judge suspects and resents the conduct of the Trust Company in instituting said New York suit".

As there is a stenographic account of what was said, which was offered in evidence in the proceedings below, and as it appears from it that there is no warrant for these statements of Mr. Rhoades (most of them in positive form, and the last one on information and belief),

we submit that they should be dismissed from consideration.

6. On June 10, 1915, the judge, of his own motion, issued an order to show cause why the prosecution of the dependent suit should not be enjoined, etc. (p 28), and shortly afterwards refused the application of counsel for the reorganization committee to modify the restraining order and order to show cause unless consented to by counsel for receivers, but said that if counsel for the receivers consented thereto, he would modify the restraining order (pp. 54-55).

7. June 28, 29 and 30, 1915, Mr. Partridge argued that the Denver Company should be brought in and an equitable lien fixed upon its property (pp. 39, 56).

8. On February 21, 1916, Judge Van Fleet expressed the opinion that the Denver Company should be made a party and its obligations enforced in the present suit (p. 36). Speaking of this order, Mr. Rhoades says, that between December 24, 1915, when counsel for the reorganization committee handed a copy of the reorganization plan to Judge Van Fleet, until February 21, 1916, neither trustee nor reorganization committee had any idea that there would be opposition to the plan (p. 48); also that counsel for the reorganization committee requested that the entry of the order of February 21, 1916, be delayed so there might be a showing of consequences, but this the judge peremptorily refused (p. 50). Mr. Rhoades adds: "I am convinced" that Judge Van Fleet acted "with the desire that the plan of reorganization should be defeated," and he "is personally opposed

thereto'' (pp. 52, 53), and he also says Judge Van Fleet identifies the Trust Company with the reorganization committee and believes it is a partisan of the plan and of the bondholders who joined therein, etc. (p. 53).

Mr. Rhoades's affidavit proceeds upon the idea that the trustee and reorganization committee were taken by surprise by the making of the order of February 21, 1916; but they had argued the matter with Mr. Partridge exhaustively in June, 1915 (pp. 39, 56), and the briefs had not been handed in until December, 1915, so that they must have expected a decision would come down one way or the other. Indeed the trustee submitted two briefs to Judge Van Fleet, December 6 and 31, 1915.

The order of February 21, 1916, and the opinion which Judge Van Fleet gave speak for themselves, although this court has said that he erred in the conclusion that he reached. His opinion, however, shows that he dealt with the matter in a manner quite in keeping with the duty of a judge. It is also said that in his opinion and order of February 21, he enjoined the petitioner from the enforcing of the obligations of the Denver Company in any court except in the District Court for the Northern District of California (p. 29), but if his view of the situation had turned out to be correct, such an order would have been the logical consequence of his judicial determination.

One other question remains to be spoken of in connection with the order of February 21, 1916, and that is whether, if the Denver Company had been brought in,

its liabilities were to be established before or after the decree of foreclosure. Mr. Rhoades states that he was "advised by counsel" (pp. 49 and 50), that if the Denver Company were brought in its liabilities could be established after decree of foreclosure just as well as before, and that although this is the fact according to the advice of his counsel, nevertheless, on February 21, 1916, there was "an intimation *although not very distinct*", that said judge would require said matters to be adjudicated in this cause before he would permit a decree of foreclosure to be entered therein. These are all matters which Judge Van Fleet dealt with in the course of the performance of his judicial duty. They cannot be assigned as the predicate for personal bias and prejudice.

(9) March 6, 1916, Judge Van Fleet refused immediately to enter a decree "without hearing counsel for the receivers" (p. 38). When Mr. Partridge appeared he opposed the entry of the decree until the obligation of the Denver Company should have been adjudicated and if possible enforced (p. 39), and the Savings Union appeared and asked to be heard regarding the fixing of the upset price (p. 40). Mr. Rhoades says that Judge Van Fleet continued the order for one week in order, as he said, to permit the receivers to be heard. In point of fact, all that occurred is set forth in case No. 2757, Exhibit 24, and speaks for itself. Also, Judge Van Fleet refused to enter the decree until this court decided the prohibition proceeding, and stated in effect "that if jurisdiction was upheld he would not direct the entry of any decree until the matter of the bondholders' claim against said Denver Company should be

disposed of by him'' (p. 51-52), and also that on the same day be refused to enter an order denying the motion for an immediate decree although counsel asked him to do so for the purpose of laying the foundation of a mandamus by them to compel him to do so (p. 52). In this connection, however, it is to be remembered Judge Van Fleet said that if the Circuit Court of Appeals decided the prohibition contrary to his view he was ready to proceed and enter the decree. At any rate, all of this matter was stenographically reported and it was laid before this court in case No. 2757 and speaks for itself.

In connection with the proceedings of March 6, 1916, Mr. Rhoades quotes language used by Judge Van Fleet (pp. 24, 25) and says that he thereby ''clearly implied'' that the trustee was not acting for all the bondholders; and Mr. Rhoades furthermore says that Judge Van Fleet ''identifies the Trust Company with the reorganization committee''; also, he says it appears from a colloquy of March 6, 1916, that Judge Van Fleet regards the Trust Company as in reality not acting for the minority bondholders but as representative solely of the majority bondholders (p. 24).

10. March 8, 1916, Mr. Partridge upon the advice of Mr. McEnerney refused to facilitate the hearing of the appeal from the order enjoining the prosecution of the dependent bill (pp. 15, 43).

11. March 13, 1916, Judge Van Fleet made an order that the receivers be authorized and directed to appear

respecting the appeal in Case No. 2756, and to protect the jurisdiction of the District Court (p. 43).

12. March 16 and 17, 1916, during the argument before this court, "said judge, through his counsel" alleged and claimed that the action of the trustee in maintaining the dependent bill was a contempt of court and "has in effect, by the order of said judge, been adjudged so to be in contempt" (p. 29); at the same time, "said judge and said counsel *clearly intimated*" that the judge, receivers and counsel believed that the dependent suit was brought for the purpose of evading jurisdiction, and therefore "the Trust Company and the majority bondholders are unwilling to confide their interests under said contract to the decision of said judge" (pp. 29-30); also at the same time, "counsel for said judge, by innuendo, plainly intimated" that the trustee "was and is in collusion with the Denver Company", and made remarks about the Denver & Rio Grande, which are quoted (p. 35); also at the same time, counsel for Judge Van Fleet resisted mandamus upon the ground that it was not proper considering the application of the Savings Union for leave to amend, and the clear implication of the argument was that the application ought to be and would be granted by the judge on account of unfairness and partiality in the administration of the trust, etc. (p. 41); and moved to dismiss the appeal (p. 44), and tried in various ways to prevent a decision upon the merits (pp. 44-45), and counsel for Judge Van Fleet cooperated with counsel for the Savings Union despite the charges of fraudulent

conspiracy made by counsel for the Savings Union (p. 42); also counsel for Judge Van Fleet "clearly intimated in argument" that the trustee "could not be trusted, in the opinion of the judge, to act fairly and impartially" between the two groups of bondholders (p. 25).

In other words, every step taken by counsel is thus sought to be imputed to the judge.

This is contrary to all authority.

See:

1 Enc. Ev. 468;

Treadway v. S. C., Etc., R. Co. (1875), 40 Ia. 526;

Davidson v. Gifford (1888), 100 N. C. 18; 6 S. E. 718;

Browning v. Lovett (1906), 29 Ky. L. Rep. 692; 94 S. W. 661.

13. We have thus brought the allegations of the affidavit down to March 16 and 17, 1916. The following day Mr. Rhoades arrived in San Francisco, and he spent the 18th, 19th and 20th making preparation for the disqualifying affidavit. March 20, 1916, the reorganization committee, presumably in New York, passed its resolution asking that Judge Van Fleet be disqualified. Later, on the 20th, 23d, 24th and 28th the petitioner filed its briefs in this court on the matters which had been submitted on the 17th.

14. We come now to those allegations and statements in the disqualifying affidavit for which no date is given.

Mr. Rhoades says, "As will appear hereinafter, said Judge constituted himself the special guardian and champion of said minority bondholders" (p. 32). This is not a fact, but a phrase. Moreover, it merely sums up other matters which we have already noted.

Mr. Rhoades also says, "I am convinced and believe that * * * he entertains a deep resentment against said Denver Company"; that he believes the charges of the Savings Union against the three banking houses, and also that the reorganization committee and trustee are co-operating with them (p. 45); that he believes also "that the Trust Company intends (although such is not its intention) to endeavor to secure an unduly low upset price to be fixed by the decree herein" (p. 45).

(b) Alleged bias and prejudice in favor of receivers and their counsel.

Paragraphs XIV and XV of Mr. Rhoades's affidavit are intended to support the charge that there is a bias in favor of the receivers and their counsel (pp. 53-56), and practically all that is said in that regard is that Judge Van Fleet frequently refused to make the orders asked by the petitioner unless counsel for the receivers consented, saying at the same time that if counsel for the receivers did consent, he would make such orders. In this same connection Mr. Rhoades speaks of Frank G. Drum as "one of the especially trusted representatives and confidential advisers of said Judge" (p. 57). There is nothing to show who informed him of this, and the whole affidavit negatives the idea that he had any personal knowledge of it.

(c) Alleged bias and prejudice in favor of the Savings Union.

Paragraph XVI of the affidavit (pp. 56-58) is given over to the facts and reasons to support the charge of personal bias or prejudice in favor of the Savings Union, and in connection with these facts it is said that counsel for Judge Van Fleet argued before this court March 16, 1916, that the pendency of the application for intervention of the Savings Union was good reason for denying mandamus, that they co-operated with counsel for the Savings Union, that they did not resent the charges of fraud and bad faith against the company, and that neither they nor Judge Van Fleet protested against the charges.

(d) Reasons offered for failure to file the affidavit in time.

Paragraph XVII of the affidavit is devoted to the reasons for petitioner's failure to file it in time (Pet. pp. 58-63).

The facts and reasons are altogether insufficient and, in that connection, we again call attention to the fact that it is held in *Crosby v. Blanchard* (1863), 89 Mass. (7 Allen) 385, that "an objection that a judge is not impartial must be taken at the trial *if then known to the counsel who conducts the case; otherwise neither he nor his client can afterwards take advantage of it;*" and that this decision is cited with approval in *Coltrane v. Templeton* (C. C. A., 4th C., 1901), 106 Fed. 370, 377, and *Utz Co. v. Regulator Co.* (C. C. A., 8th C., 1914), 213 Fed. 315, 319.

XVI.

THE STATEMENT THAT JUDGE VAN FLEET WILL DETERMINE MR. PARTRIDGE'S COMPENSATION IS SET FORTH FOR THE FIRST TIME IN THE PETITION VERIFIED BY MR. HOW AT PORTLAND ON APRIL 10, 1916.

The petition drawn by Mr. How and verified by him at Portland April 10, 1916, two days after Judge Van Fleet determined that the disqualifying affidavit was neither sufficient nor timely, contains the following allegation to show the "controversies" before Judge Van Fleet (Pet. p. 16):

> "Said Judge intends to and will in said proceeding fix and determine the up-set price for which the said property is to be sold; that said Judge will also pass upon and determine the question of the right of the petitioner, Savings Union Bank & Trust Company, to intervene in said cause. Said Judge will also in said cause pass upon and determine the compensation to be paid to John S. Partridge, counsel for the receivers and counsel for the said Judge, as herein stated."

Until Mr. How verified the petition April 10, 1916, a controversy over the compensation to be paid to Mr. Partridge had not even been suggested, much less presented to Judge Van Fleet, as a reason for his disqualification. Indeed, in the form of decree presented to Judge Van Fleet March 6, 1916, it is expressly provided that the claims of the receivers and their counsel shall be paid by the purchasers of the property, and it is clear, therefore, that the trustee is not interested in the matter (p. 4, ante).

XVII.

CONCLUSION.

It is respectfully submitted that mandamus be denied.

Dated, San Francisco,
May 6, 1916.

GARRET W. MCENERNEY,
JOHN S. PARTRIDGE,
Counsel for Respondent.